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Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA, New York, N.Y.

5 v.

6 S14 11 Cr. 1091 (VM)

7 PETER LESNIEWSKI, MARIE BARAN
8 and JOSEPH RUTIGLIANO,

9 Defendants.
10 -----x
11

12 July 31, 2013
13 9:15 a.m.

14 Before:
15

16 HON. VICTOR MARRERO,

17 District Judge
18

19 APPEARANCES
20

21 PREET BHARARA

22 United States Attorney for the
23 Southern District of New York

BY: JUSTIN S. WEDDLE
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1 APPEARANCES CONTINUED

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5 KEVIN MENEILLY
6 Attorneys for Defendant Joseph Rutigliano7 - also present -
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10 Emma Larson, Government Paralegals

11 SA Frank LoMonaco, FBI

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1 (Trial resumed)

2 (In open court; jury not present)

3 THE COURT: Good morning. Welcome back.

4 The purpose of this conference is to review the draft
5 jury instructions that the Court circulated to the parties
6 yesterday.

7 Has the government received the draft?

8 MR. WEDDLE: Yes, your Honor. We have received it and
9 I have reviewed it.

10 THE COURT: All right. Mr. Durkin?

11 MR. DRATEL: Yes, your Honor.

12 THE COURT: Mr. Dratel?

13 MR. DRATEL: We received it and reviewed it.

14 THE COURT: Mr. Jackson?

15 MR. JACKSON: Yes, Judge. Thank you.

16 THE COURT: Mr. Ryan.

17 MR. RYAN: Yes, I have, Judge.

18 THE COURT: Let me outline the way I ordinarily go
19 through these conferences.20 This is a first draft. What I usually do is invite
21 the parties to give what I refer to as global comments, by
22 "global" meaning large issues that pertain to instructions that
23 are either there and should not be or that are not there and
24 should be or that are there and in your view do not reflect the
25 proper statement of the applicable law.

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1 After we go through those global comments, I will
2 consider the comments and endeavor to revise in the next draft
3 as appropriate. I may make revisions if I agree that revisions
4 are appropriate. If do not, of course, I will not. The next
5 draft will reflect comments accepted and comments not accepted.

6 At that time I will also make whatever technical or
7 grammatical or editorial changes of a routine nature that you
8 spot, and those I invite you to call to the clerk's attention
9 and we will reflect them in the next draft. By "those" I'm
10 referring to obvious things. If, for example, there is a
11 reference to one gender and it should be another, we will
12 automatically make those changes as you point them out.

13 One other general concept in my approach. This case
14 involves wire fraud and mail fraud and health care fraud. This
15 is not the first case in the history of the Southern District
16 of New York where government has brought charges involving wire
17 fraud, mail fraud and health care fraud.

18 I mention that by way of saying that there is a vast
19 amount of law and litigation and disputes about jury
20 instructions going back many, many years that pertain to these
21 issues. By this time the law should be fairly clear as to what
22 a proper instructions for these kinds of charges that are at
23 this point fairly standard.

24 There are cases every year in this district that are
25 resolved one way or another based on instructions that have

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1 been accepted time and again and tried and tested and adopted
2 or affirmed on appeal by the Court of Appeals. The point is
3 that there should be little reason for major conceptual,
4 philosophical differences about what a standard instruction
5 should be for a mail fraud, wire fraud, health care fraud type
6 charge.

7 I could see that there may be some questions that
8 might arise that relate to the peculiarities of a particular
9 case, but on a large-scale view I think the pattern
10 instructions are fairly standard and sufficient.

11 If there is a major dispute about what the instruction
12 should be on a particular issue, what I generally do is go to
13 the pattern jury instructions from the Sand treatise, which
14 reflect years and years and years of wisdom and experience on
15 these charges, and I generally adopt what it says there insofar
16 as they reflect instructions already used and accepted on
17 appeal by this circuit.

18 So with that I will then ask the parties respectively
19 to indicate what global comments you may have.

20 The government, if you have something just indicate
21 the first page at which any of your comments appears and then I
22 will ask the defendants to respond.

23 MR. WEDDLE: Yes, your Honor.

24 I think the first real substantive comment that we
25 have is on page 38. It is just that Section 1349, which is a

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1 relatively new conspiracy statute, does not require an overt
2 act. So there is no overt act requirement for Section 1349.
3 This is the case also in other newer conspiracy statutes.

4 It is well settled that there is no overt act
5 requirement in a narcotics conspiracy or money laundering
6 conspiracy. Those cases rely on the plain language of the
7 statute, and say that if there is an overt act requirement in
8 the statute, there is one; and if there isn't, then there
9 isn't. I apologize I don't have the case citation at my
10 fingertips. I can look for one. I think it would only take me
11 a few minutes to find a case that stands for the proposition
12 that Section 1349 does not have an overt act requirement.

13 Because that is the law, we didn't enumerate any overt
14 acts in the indictment for the Section 1349 conspiracy, but we
15 did with respect to the 371 conspiracy. So there are overt
16 acts in the indictment and plenty have been proven, but we
17 think there should just be two elements of the Section 1349
18 conspiracy.

19 THE COURT: All right. I think that is fairly
20 straightforward. Any response to that from any of the defense
21 counsel.

22 MR. DRATEL: Your Honor, that does state the law with
23 respect to the statute that does not have an overt act
24 requirement. So that is the general tendency more recently.

25 THE COURT: All right. Thank you.

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1 Next, government?

2 MR. WEDDLE: The next, which is actually a quite small
3 change, but on page 59, which relates to the health care fraud.
4 The instruction talks about depriving Medicare of money or
5 property. The victim of health care fraud here is United
6 Healthcare.

7 THE COURT: What paragraph are you referring to?

8 MR. WEDDLE: I'm sorry. It's in the second full
9 paragraph at the end of the paragraph on page 59.

10 THE COURT: Yes.

11 MR. WEDDLE: The next comment --

12 THE COURT: United Healthcare instead of Medicare?

13 MR. WEDDLE: That's right.

14 THE COURT: Yes.

15 MR. WEDDLE: The next comment we have is on page 71,
16 which relates to wire fraud.

17 THE COURT: Yes.

18 MR. WEDDLE: We think there are good arguments to be
19 made based on out of circuit case law that there is no
20 unanimity requirement for the wiring. But just to avoid the
21 issue, we are happy to have this jury instructed that they
22 should be unanimous on at least wire transmission for each
23 count.24 THE COURT: Any comment on that issue from any defense
25 counsel?

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1 MR. DURKIN: We are in agreement unanimity is required
2 on each, at least one transmission in each count, your Honor.

3 THE COURT: All right. Thank you.

4 Mr. Weddle, next?

5 MR. WEDDLE: This is not very substantive, but I think
6 your Honor anticipated in your draft something that I have been
7 thinking in the back of my mind we should do.

8 There are two theories on Count 21, which is the false
9 statements count brought against Joseph Rutigliano alone. And
10 I don't think there is a material difference between the two
11 theories, but they each come with a five-element set of
12 instructions in the Sand treatise, your Honor.

13 We think, just to simplify things, as your Honor has
14 done, we should just use one of those two theories. Your Honor
15 has just instructed on one of the theories, but in order to
16 avoid confusion, we could redact the other theory from the
17 indictment entirely. On page 73, for example, just a
18 conforming change, your Honor says in your draft in the
19 paragraph at the bottom, "We now turn to the second theory
20 alleged in the indictment."

21 We could just redact part of the indictment, focus
22 only on one of the theories, and then there would only be one
23 theory we would need to instruct the jury on and that would
24 simplify things. The instructions that your Honor has given
25 are unobjectionable with respect to the one theory which I

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1 think is the most straightforward one.

2 THE COURT: All right. So the government is
3 representing that it will modify the indictment to remove
4 references to the second theory?

5 MR. WEDDLE: Yes, your Honor.

6 I haven't made that change to the indictment, but I
7 can do that very quickly. Along the same lines, as predicted
8 at the beginning of this case, the government substantially
9 pared down its proof as the trial was going on based on how the
10 proof was coming in, and so we've ended up not calling certain
11 witnesses, which means we ended up not proving certain of the
12 substantive counts that were originally charged.

13 I e-mailed this to your clerk last night. I should
14 have done it earlier and I apologize. But over the -- I can't
15 remember when, the last few days, I went through the indictment
16 and redacted the counts that we have not proven and therefore
17 that should be dismissed.

18 So with the exception of this one change on the
19 Section 1001 count, I think that the indictment that I
20 circulated last night just after your Honor circulated your
21 Honor's draft I think reflects the counts that should go to the
22 jury. I think to avoid confusion we should just give the jury
23 a redacted indictment. It's much simpler and eliminates things
24 where we didn't call witnesses.

25 So, after redacting the indictment in that manner, we

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1 end up with 21 counts.

2 So I have small conforming changes that I have
3 handwritten on the draft to reflect those redactions, but we
4 have many fewer counts of each substantive charge. The
5 conspiracy counts stay the same, although we have fewer overt
6 acts in each one. It's really a smaller list of overt acts at
7 this point, and I think that simplifies the indictment.

8 THE COURT: All right.

9 At some point, Mr. Weddle, for the record the
10 government should itemize the counts that are dropped so that
11 we have a transcript of what those are.

12 MR. WEDDLE: I will do that, your Honor. I would like
13 to just have a minute to make sure I do that right.

14 THE COURT: Of course. All right. If there is
15 nothing else from the government then --

16 MR. WEDDLE: Oh.

17 THE COURT: Yes.

18 MR. WEDDLE: Then outside the draft we had two
19 substantive issues. One was we had proposed a charge that
20 negligence of the victim is not a defense. I think, although
21 it hasn't been argued strenuously so far by the defense, they
22 have elicited from a number of witnesses the fact that the RRB
23 has doctors and that the RRB makes a determination. I think
24 that has the possibility of raising a logical question in the
25 jury's mind, which is to what extent should we be considering

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1 whether the RRB should have stopped this.

2 So it was something that was not included in the
3 Court's draft. We think it's still appropriate and it is a
4 relatively brief instruction that I don't think is
5 controversial. But we've submitted it in our requests to
6 charge. That was one issue.

7 THE COURT: We left it out recognizing that that would
8 be an issue. It was purposely left out because I wanted to
9 invite comment on it, not that we left it out for the purpose
10 of leaving it out entirely.

11 MR. WEDDLE: I can say more about it, but I think I
12 have said what I need to say about it. Then I had one
13 additional charge.

14 THE COURT: What was the additional charge?

15 MR. WEDDLE: The additional charge, your Honor, that
16 we submitted, and defendant Rutigliano submitted a competing
17 version, but in our requests to charge at the end we proposed a
18 charge on occupational disability.

19 The standard for occupational disability is not
20 particularly controversial. Witness after witness have
21 basically articulated the same standard. But it is a matter of
22 law, so to the extent there is any difference between what the
23 witnesses have said, what really should control is what the law
24 is.

25 So we propose just a brief instruction on the law, the

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1 standard that is in the law, that's in the Code of Federal
2 Regulations regarding the standard for occupational disability.

3 This came up early in the case, and your Honor may not
4 remember it, but one thing that Mr. Ryan was cross-examining
5 witnesses about, it may have just been one witness, was a
6 process that took place in 1997 where basically negotiating
7 representatives, not members of the board of the RRB, but
8 negotiating representatives put together a set of principles by
9 which they would work together in order to come up with
10 revisions to the Code of Federal Regulations.

11 Some of that questioning may have suggested to the
12 jury that this 1997 process or these principles that were put
13 together by these negotiating representatives who were not
14 government officials was somehow a competing standard or
15 somehow was the standard. That process led to the regulations
16 that have been in place throughout this conspiracy, so we
17 objected at the time. We thought that going into history of
18 1997 and what led to the final regulations which are the law
19 was irrelevant, but I think that it's useful to dispel any
20 confusion on that by talking about what is the standard that is
21 in the law.

22 THE COURT: All right. Thank you. Mr. Dratel?

23 MR. DRATEL: Your Honor, just if we can first talk
24 about negligence of the victim. I don't think that instruction
25 is necessary or appropriate here because we haven't argued it.

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1 No one has argued it. No one is going to argue it. I think we
2 essentially presented a defense through cross-examination of
3 witnesses. The defense as a whole I'm speaking of -- although
4 I am not speaking for Mr. Jackson or Mr. Ryan -- but I think in
5 my own observation presented the opposite, which is that the
6 RRB's process is a coherent, comprehensive process that makes
7 decisions based on objective evidence.

8 We don't take the position that they somehow didn't do
9 their job. It is that they did do that their job.

10 I don't think that instruction is appropriate. I
11 think it's confusing and gets the jury off on a diversion that
12 has not occurred in this case and will not occur during closing
13 argument, certainly not from us and speaking to cocounsel I
14 don't believe that they are going to argue that either. So I
15 agree with the Court in leaving it out.

16 Second is with respect to the CFR instruction. If the
17 Court could ask the government, if we could just find out where
18 that is. I haven't looked at it because it wasn't in the -- I
19 haven't looked at it since we did it a month ago. Is it in
20 joint instructions or the ones that the government provided
21 separately?

22 MR. WEDDLE: It was not in the joint instructions. It
23 was the page 44 of 45, the last two pages of the government's
24 requests to charge that we submitted on July 8.

25 MR. DRATEL: If we could have a few minutes to discuss

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1 that among ourselves, not necessarily right now.

2 THE COURT: That's fine.

3 MR. DRATEL: I will be happy to make my presentation
4 on the Court's charge. I don't have very many big-picture
5 issues, and some of them are really just about a word or two.
6 It's not really grammatical. The ones I'll raise are what I
7 consider substantive in that regard, even if it is one word
8 here or there.

9 THE COURT: All right.

10 MR. DRATEL: The first is on page 10 with respect to
11 charts. The only question I have on that is -- I realize
12 Ms. Friedlander is not here, so perhaps we should defer
13 argument -- it has to do with Dr. Barron's charts.

14 There was a question about whether we would -- we
15 think that they are not substantive evidence. We think they
16 are demonstratives. There are even a couple of instances where
17 he corrected his charts from the stand and acknowledged that
18 they were inaccurate. We think they are demonstrative and not
19 substantive evidence, which means they would not go to the jury
20 for purposes of summation. They were used for purposes of his
21 testimony, but they are not substantive evidence.

22 THE COURT: What specific language are you referring
23 to on page 10?

24 MR. DRATEL: It is not the language. It doesn't
25 require changing the instructions. It is just something that

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1 we hadn't resolved.

2 THE COURT: The issue is whether or not the
3 demonstratives go to the jury?

4 MR. DRATEL: Correct.

5 It is not for the instructions. It's really more
6 about an open issue that I didn't want to let travel any
7 further before I addressed it.

8 THE COURT: All right. Mr. Weddle, do you have
9 comment on this?

10 MR. WEDDLE: On that issue the law is very clear that
11 summary charts admitted in evidence by a witness like Dr.
12 Barron are evidence. They have been admitted and they can go
13 to the jury. It would probably take me ten minutes to cut and
14 paste from briefs that I have written in other cases on this
15 very issue.

16 THE COURT: We don't need that. It has been the
17 accepted and affirmed practice in this circuit, and this Court
18 routinely gives the jury any demonstrative that has been part
19 of the case. I don't see any dispute on that, Mr. Dratel.

20 MR. DRATEL: OK, your Honor.

21 They hadn't actually been admitted. I think
22 Ms. Friendlander was moving to admit them afterwards, and we
23 objected and we deferred. But if that's the Court's ruling, I
24 will move on.

25 On page 14, with respect to the second full paragraph

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1 about stipulations about facts, I would just ask that after
2 that the Court repeat the last sentence from the previous
3 paragraph, in other words, that weight is always a question for
4 the jury.

5 In other words, you have a sentence after the
6 stipulation paragraph, that's the first full paragraph, and I
7 would just ask that that last sentence, "However, it is for you
8 to determine the weight to be given that testimony," the same
9 thing for the factual stipulations as well.

10 MR. JACKSON: What page?

11 MR. DRATEL: Page 14.

12 MR. JACKSON: Got it.

13 THE COURT: All right.

14 MR. DRATEL: On page 16, your Honor, the large
15 paragraph, the final sentence.

16 It says, after examining all the evidence -- and I
17 know the Court has had this in a number of places -- I just
18 think that or lack of evidence belongs there too, especially
19 when you are talking about the numerical weighing of witnesses,
20 I think it is appropriate to also just say, after examining all
21 the evidence or lack of evidence you may decide that the party
22 calling the most witnesses --

23 Let me move to page 21. The subpoena instruction I
24 don't think is necessary. I am not sure what the purpose is
25 here, given that we haven't had any issues with respect to that

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1 as far as I can tell. So that paragraph starting, "You have
2 heard that various documents," I think that paragraph is not
3 necessary and should be deleted.

4 MR. WEDDLE: Your Honor, I think it is an appropriate
5 instruction. We have heard testimony about Marie Baran
6 producing documents in response to a subpoena. We have heard
7 testimony about Dr. Lesniewski or Island Sports Medicine
8 producing documents in response to a subpoena.

9 I think that sometimes jurors can be confused and
10 think that because someone produces documents, that is
11 indicative of their guilt or innocence. It's really not. It
12 is something they are obligated to do.

13 This instruction is appropriate to avoid any confusion
14 in that respect. It is fairly standard, your Honor.

15 MR. DRATEL: Your Honor, it's not standard in cases
16 that I have done in cases involving scores of subpoenas. The
17 other problem is I think because there has not been any
18 testimony or suggestion about -- well, I think it creates the
19 opposite inference.

20 There is no suggestion here, there hasn't been a
21 suggestion that somehow people are free to avoid subpoenas or
22 somehow that because you produce in response to a subpoena that
23 that somehow absolves of you of any responsibility for conduct.
24 It creates the opposite inference, which is somehow that
25 somebody hasn't complied. I think that's the danger of this

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1 instruction, is that in a vacuum of any evidence about
2 compliance with subpoenas being an issue, it is not an issue,
3 that it creates an issue that maybe there was some problem,
4 that people have an obligation to produce them. Maybe they
5 didn't produce everything. I am very concerned about the
6 opposite inference being drawn because of the vacuum in terms
7 of it doesn't have a particular relevance in this case.

8 THE COURT: Thank you. We will consider that.

9 MR. DRATEL: OK. Thank you.

10 Pages 22 and 23, your Honor, the accomplice
11 instruction.

12 A couple of things. One, I think where it starts
13 "however" on the bottom of 22 the last paragraph, I don't think
14 it's a possible interest. I think the accomplices do have an
15 interest in testifying as part of their cooperation agreement.
16 They are obliged to testify when asked by the government. So I
17 think they had an interest.

18 Also, what I think is missing from the instruction and
19 is necessary is a question of benefits, not so much an interest
20 in the outcome of the case. And I would actually remove that
21 language on page 23, because they don't have an interest in the
22 outcome of the case. They have an interest in performing
23 pursuant to their agreement to get the benefit of a 5K letter.

24 I don't think it has to be that technical, but I think
25 there has to be some concept that they anticipate or expect a

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1 benefit for their testimony and that's something the jury has
2 to consider. I think that's standard in accomplice
3 instructions.

4 But I don't think they have an interest in the outcome
5 of the case. I think the opposite. I think the government
6 made clear from the direct that there doesn't have to be a
7 particular result in this case for the witnesses to gain a
8 benefit.

9 That's the second full paragraph has the interest in
10 the outcome of case language on page 23.

11 MR. WEDDLE: Your Honor, the first part of
12 Mr. Dratel's comments I disagree with. For example, we heard
13 from Regina Walsh, who was an accomplice in the fraud, has pled
14 guilty, and doesn't have a cooperation agreement. She was here
15 testifying voluntarily. So the first part of this comment I
16 think is incorrect.

17 MR. JACKSON: Judge, before we move to the second
18 part, I don't mean to interrupt Mr. Weddle, but before he
19 transitions, he did mention Regina Walsh. That directly
20 impacts me. I think to suggest that she didn't have a benefit,
21 I asked her, and she was faces a year in jail and was hoping to
22 get probation.

23 I think what Mr. Dratel had just mentioned resonates
24 crystal clearly with regard to her testimony, and I argue
25 that's why she's here. She is not here based upon being a good

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1 Samaritan. She is here to get probation.

2 That pretty much clarifies and buttresses the point
3 that my colleague is making, in that it is not so much in
4 interest in the outcome of this case. It is an interest in
5 securing a benefit that she hoped to secure by your Honor's
6 sentencing of her. Therefore, I would echo the concerns raised
7 by Mr. Dratel and ask that you factor them into your
8 instructions.

9 MR. DRATEL: That's why, your Honor, I don't want it
10 to be technical language about 5K letters and things like that.
11 It is a more general proposition.

12 THE COURT: All right.

13 MR. WEDDLE: Your Honor, where are we?

14 THE COURT: Philosophically let me just indicate that
15 every citizen should have an interest in good government and
16 that justice be done regardless of how the case goes. So I
17 don't disagree that deriving a benefit is important as a
18 reflection, but the fact that having an interest in the outcome
19 of the case is generic language, I think both pertain. I will
20 find some way of reflecting both ideas.

21 MR. DRATEL: Thank you, your Honor.

22 THE COURT: All right.

23 Mr. Weddle?

24 MR. WEDDLE: I think the argument is only about the
25 word "possible." "Possible interest," I think that people are

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1 making different arguments here, and the Court's instruction as
2 drafted is perfectly appropriate because the Court shouldn't be
3 taking a position one way the other about what someone's
4 interests are.

5 Regina Walsh testified that she was interested in
6 righting a wrong. That's what her testimony was. Your Honor
7 shouldn't be taking a position that is adopting Mr. Jackson's
8 argument about what she was doing.

9 MR. JACKSON: I am not asking you to adopt any
10 argument. I'm asking that you, what Mr. Dratel says reflects
11 adequately why the witness is here. In a utopian society we
12 all have interests in everything and humanity would be
13 wonderful and let's love the whales and support the
14 environment.

15 THE COURT: Are you against that?

16 MR. JACKSON: Not at all, Judge.

17 But the fact is I'm not asking you to adopt and
18 instruct the jury that Ms. Walsh is here to save her own hide.
19 The fact is that, you know what, she may be interested in the
20 outcome. I'm asking you to reflect what Mr. Dratel is saying.
21 She has an interest, and it's clear she is here not because she
22 wants to save the whales and snails and elephants. She's here
23 because she wants you to give her probation.

24 I am going make that argument crystal clear. They
25 have a different view based on whatever their view of the

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1 evidence is.

2 MR. DRATEL: Your Honor, with respect to "possible,"
3 the way it's phrase right now is doubly conditional. I think a
4 single conditional is sufficient. So if it just said because
5 of the interest an accomplice may have in testifying, that is
6 sufficient to be conditional. I don't think the possible there
7 creates another condition is --8 THE COURT: You pointed out the issue. Let me reflect
9 upon it and we'll respond in some appropriate way.

10 MR. DRATEL: Thank you, your Honor.

11 THE COURT: Next, Mr. Dratel.

12 MR. DRATEL: Let's go to 39, your Honor.

13 MR. DRATEL: The language at the end of the last full
14 paragraph, the last sentence, "It is rare that a conspiracy can
15 be proven by direct evidence of an explicit agreement."16 We would object to that sentence. I don't think it is
17 necessary. It may be true, but it's almost like marshaling the
18 evidence in a certain way.19 THE COURT: This is one of those instances,
20 Mr. Dratel, where we can start gilding the lily.21 MR. DRATEL: I understand. But there are few of
22 these.23 THE COURT: It is in every instruction that I have
24 ever given in conspiracy cases.

25 MR. DRATEL: I know. This is my first trial before

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1 you, your Honor.

2 THE COURT: Could I cite my cases?

3 MR. DRATEL: Page 40.

4 THE COURT: Yes.

5 MR. DRATEL: I would just change in that first full
6 paragraph where it says, "Often the only evidence," I would
7 just say "sometimes." Again, I think that triggers a certain
8 thing that the jury should be looking for. I don't think it is
9 intentional. I just think that it does do that.

10 THE COURT: Where on page 40?

11 MR. DRATEL: I'm sorry. It's the first full
12 paragraph, "The old adage 'actions speak louder than words'
13 applies here."

14 Then it says, "Often the only evidence."

15 I would just say "sometimes," because I think "often"
16 just tends to trigger a concept that, OK, here there is
17 something different that we have to do differently.

18 THE COURT: All right. We'll think about that.

19 Next?

20 MR. DRATEL: Page 47, your Honor. That first full
21 paragraph. The word "frequently" I don't think is necessary
22 either. I think it is a statement of a law that, however, an
23 apparently innocent act does shed its harmless character. So I
24 think it should be just declarative.

25 THE COURT: All right. Next.

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1 MR. WEDDLE: Your Honor, this part comes in the
2 section on the Section 1349 conspiracy, so I think that page 46
3 and page 47 should all be deleted. The same concepts should
4 probably be included if they haven't already, I have to check,
5 in the Section 371 conspiracy, but on this, just execute that
6 one issue, this part I think would be deleted.

7 MR. DRATEL: I do think, your Honor, that while it's
8 true about the 1349, I think that's the most comprehensive
9 treatment of overt acts, and then you simply refer to it later.
10 It may not be the case, but that's my recollection.

11 THE COURT: So we will reflect the overt act language
12 in the other instructions as it applies here and we'll look at
13 the frequently language that Mr. Dratel has pointed to.

14 Next?

15 MR. DRATEL: Page 55. I don't think withdrawal is an
16 issue here, so we would object to that instruction. Again, it
17 is just injecting an element that is not applicable in this
18 case as far as we can tell. I don't know that any counsel is
19 going to argue withdrawal.

20 MR. WEDDLE: It is an issue in the case, your Honor,
21 because if you will recall the mail fraud counts are tied to
22 these continuing disability certifications that were sent to 26
23 Federal Plaza in 2011.

24 I think Mr. Rutigliano's counsel has made explicit
25 arguments, or maybe it is just previewing specific arguments

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1 with respect to some of his requested instructions that Joseph
2 Rutigliano, who advised people like Christopher Parlante and
3 James Maher years before that 2011 mailing, had nothing to do
4 with the mailing.

5 But, of course, the conspiracy continues unless Joseph
6 Rutigliano withdraws from it, which he certainly didn't do. So
7 when those mailings are made in furtherance of that conspiracy,
8 Joseph Rutigliano has committed the substantive crime.

9 Withdrawal is very important in this case, because
10 there is a time line sometimes of years between when Joseph
11 Rutigliano wrote up somebody's fraudulent application and that
12 person later confirmed by filing or was required to and did
13 file a certification form with the RRB in furtherance of
14 keeping that fraudulently obtained disability.

15 THE COURT: Thank you.

16 Mr. Dratel, next?

17 MR. DRATEL: Your Honor, this is about something that
18 is not in there, and I just wanted to, if you want me to get
19 into that -- I only have two more on what's in there.

20 THE COURT: Let's get those two, and then we will
21 address what is not.

22 MR. DRATEL: We object to the Pinkerton instruction.
23 I don't think this is a classic or even nonclassic Pinkerton
24 type of case.

25 THE COURT: What page?

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1 MR. DRATEL: Page 77.

2 MR. DRATEL: It does state the law accurately. I just
3 think this is not the kind of case where there is -- there is
4 no connection among defendants and possible conspirators enough
5 to have a Pinkerton instruction here. That is our position.

6 THE COURT: Mr. Weddle?

7 MR. WEDDLE: The Pinkerton instruction is directly
8 applicable to what I just discussed with respect to the mail
9 fraud. The conspiracy was formed when people were planning to
10 retire.11 For example, Joseph Rutigliano prepared these
12 fraudulent applications. They were submitted. Then years
13 later people filed these certification forms that they were
14 required to, that they needed to submit in order to continue
15 getting their disability benefits.16 At the outset they may not have even thought about the
17 fact that there would be a certification form in 2011, but it
18 is a foreseeable part of the conspiracy that you would have to
19 update the RRB, it might be checked on, so those mailings in
20 2011 were in furtherance of the conspiracy. Under the
21 Pinkerton theory, properly applied to this case, that makes
22 Joseph Rutigliano guilty of mailings sent by Christopher
23 Parlante and James Maher in addition to the other theories that
24 are in the instruction.

25 THE COURT: Thank you.

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1 Next, Mr. Dratel?

2 MR. DRATEL: Your Honor, page 83 the venue
3 instruction.4 The language about -- it is after the listing of the
5 counties that comprise the Southern District. It then says,
6 "In addition the Southern District of New York includes the
7 water surrounding Long Island and Manhattan as well as the air
8 space and all of the waters in the district, the air space
9 above the district or the waters in the district."10 We object to that part of the instruction. This is
11 not an appropriate application of the statute that the
12 government seeks to apply here, which is 28 U.S.C. Section 112.13 This is not a situation in which conduct occurred on
14 the waterways like someone driving over a bridge or being on
15 the East River or somewhere else.16 This is purely a completely semantic and technical
17 application of that statute which we think is inappropriate.18 If I could just, I will do the argument briefly. I
19 will start with the underlying and won't go into it in great
20 detail, but the underlying, not in order of importance, but
21 sort of going from the broad into the specific.22 One is the constitutional dimension of venue, which is
23 important in all the cases. It's the only provision that is in
24 the Constitution twice. It was in the Declaration of
25 Independence. It is a critically important aspect of

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1 jurisdiction.

2 The second is that there are cases, and I will give
3 the Court the cases. One is United States v. Bezmalinovic.
4 That's 962 F.Supp. 435. It is a 1997 opinion in this district,
5 your Honor, in which ministerial acts with respect to bank
6 processing were found insufficient to provide venue in the
7 Southern District of New York. I think that's very similar, if
8 not completely analogous to here.

9 Another case is United States v. Geibel, 369 F.3d 682
10 (2d Cir. 2004). And in that case it was processing of
11 securities transactions. The Court recognized and endorsed the
12 position of the appellant in that case that to permit venue to
13 be based on that alone would be to basically give the Southern
14 District carte blanche to prosecute any securities case in the
15 country.

16 So that is an important aspect of this as well,
17 because it really provides venue for any transmission, and many
18 international transmissions come through here as well. So the
19 notion that that creates venue I think opens up floodgates that
20 are inappropriate. It is no more concrete in this case than it
21 would be in any of those other cases.

22 The third case is United States v. Ramirez, 420 F.3d
23 134 (2d Cir. 2005). In that case the Court noted in the
24 context of a scheme to defraud and said that if a defendant
25 driving across the country devised a scheme to defraud, there

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1 would not be venue in each district in which he drove through.

2 So they recognized that.

3 The third thing is in the context of what the conduct
4 elements are, which is what venue is supposed to be, the
5 conduct elements that comprise the offense here by the
6 defendants all occurred in the Eastern District. In fact, this
7 case was first in the Eastern District, which I think
8 reinforces the argument that that particular statute should not
9 be used to establish venue in this case.

10 THE COURT: Mr. Dratel, a couple of observations on
11 what you just said. One is that sounds like a pretrial motion
12 on venue grounds. Alternatively, are you making a motion for
13 dismissal on venue grounds at this point?

14 MR. DRATEL: Well, I guess so, your Honor.

15 THE COURT: Or are you preparing to appeal?

16 MR. DRATEL: Even though we have a stipulation to put
17 in, we were going renew our Rule 29. I thought it was
18 appropriate to do it here in the context of the charge, yes.

19 As far as the pretrial motion, the government charges
20 in the indictment in the Southern District and elsewhere. That
21 is sufficient for indictment purposes. They just didn't prove
22 it. So it's really a question of proof. It's a sufficiency
23 issue. So I don't think it would have been right pretrial.

24 THE COURT: All right.

25 Then the third observation is that some of the

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1 arguments that you are making pertaining to activities and
2 where they occurred don't address the issue raised by the
3 government, which is whether or not the waters and air space
4 referred to here surrounding Long Island and Manhattan are part
5 of the Southern District.

6 If you are prepared to say that you are waiving any
7 arguments on those issues and you will not raise them on
8 appeal, then I would consider what you are saying. In other
9 words, if I leave this language out --

10 MR. DRATEL: Yes.

11 THE COURT: -- and then you appeal the case and you
12 say, but the waters around Manhattan and the air space are not
13 part of the Southern District of New York, if that had been the
14 case, it should have been in the instruction. That sounds like
15 the classic whipsaw.

16 MR. DRATEL: Oh, no, your Honor. Our position is
17 that, while the statute is plain on its face and includes
18 within the Southern District those waters, that that is not a
19 basis for venue in this case, that that type of venue is for
20 cases in which a conduct element, such as the one case that it
21 appears in that we could find was a case in which someone was
22 driving over the Verrazano Bridge, and that created venue.
23 That is a conduct element. That's someone's actually --

24 THE COURT: You are arguing a different point. The
25 point here is whether or not statutorily what it says here is

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1 correct, that the Southern District of New York includes the
2 water and air space surrounding Long Island and Manhattan. If
3 that is a statutorily proper statement, then I don't see why we
4 are having argument.

5 MR. DRATEL: Your Honor, I guess we are making a
6 sufficiency argument initially.

7 THE COURT: On the statute?

8 MR. DRATEL: Right. The Court has correctly
9 identified that. Also, I think just in terms of -- I guess we
10 don't think as a matter of law that that would be a proper
11 basis for venue here.

12 THE COURT: Again, you are raising a different issue.

13 MR. DRATEL: I understand, your Honor. I am just
14 trying to state our position.

15 THE COURT: The issue is whether or not the statement
16 belongs until the instructions, assuming we give an instruction
17 as to what is venue and what is the Southern District of New
18 York.

19 MR. DRATEL: Your Honor, I guess I'm trying to
20 articulate it for the Court, which is that if there were two
21 theories of a particular type of liability in a statute, and
22 one was presented in the evidence and one wasn't, then I would
23 argue that the second theory that the government didn't put in
24 any evidence of that -- and I'm asking this as an evidentiary
25 question -- shouldn't be instructed to the jury as a basis for

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1 conviction when there was no basis -- I understand there was an
2 evidentiary basis because we have a stipulation that says it.

3 I am saying as a legal basis we don't believe this
4 statute applies as a basis for venue. That is why we don't
5 think it should be in the instruction.

6 I don't know if I have made it clear, your Honor. If
7 I haven't, I will try again.

8 THE COURT: Mr. Dratel, the consequence of not having
9 in it in the statute is basically you are either giving the
10 jury a reason to find that they cannot convict, or the Court
11 would be obliged because it finds that this provision is not
12 satisfied essentially to dismiss the case at this point.

13 MR. DRATEL: Certainly the latter, your Honor, we
14 believe, but I was going to wait until we closed.

15 THE COURT: That is another issue.

16 MR. DRATEL: Yes.

17 THE COURT: Now we are talking about whether
18 technically the Southern District of New York as defined in the
19 statute includes the language that is here.

20 MR. DRATEL: Right.

21 THE COURT: Which is the water and air space around
22 and Manhattan.

23 MR. DRATEL: That does state the statute, your Honor.

24 THE COURT: Then let's put the other issue aside for
25 the moment.

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1 You had one other issue?

2 MR. DRATEL: Yes, also on venue, I just want to
3 preserve the issue particularly in the case where venue is a
4 close issue here, is that we think venue should be established
5 beyond a reasonable doubt.

6 There is a series of cases that have evolved since the
7 initial -- I don't want to get into the whole thing. I have a
8 whole thing on it. I know that you are bound by the circuit
9 and all that, but I think it is a reasonable doubt.

10 THE COURT: I don't know what happens in other
11 circuits, but in this circuit it has been black letter law that
12 preponderance of the evidence is the standard.

13 MR. DRATEL: I understand, your Honor. I am just
14 preserving that issue. Someday.

15 THE COURT: You are preserving it to argue in the
16 Ninth Circuit?

17 MR. DRATEL: I think the Third Circuit is the only one
18 where it is an open issue.

19 THE COURT: If you can find a way of appealing this
20 case to the Third Circuit, be my guest.

21 MR. DRATEL: The one other issue that is not in the
22 instructions --

23 MR. WEDDLE: Can I just say a couple of things about
24 venue.

25 THE COURT: Let Mr. Dratel finish his points if he has

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1 any more on venue.

2 MR. DRATEL: Nothing on venue, your Honor.

3 THE COURT: All right.

4 MR. WEDDLE: Going to your Honor's first point, your
5 Honor, the indictment specifically says in paragraph 52 in the
6 to-wit clause that in the course of the executing the wire
7 fraud scheme the defendants caused RRB disability papers to be
8 transmitted by wire and radio through the Southern District of
9 New York. That's exactly what we've proven, and that's exactly
10 the theory that Mr. Dratel is now saying is not a valid theory,
11 because it needs to be something having to do with conduct that
12 occurred in Long Island.

13 It is not the law, it is not what the indictment said,
14 and it is not what the facts are. So if he wanted to make this
15 motion, he should have made it before trial, and it's waived
16 under Rule 12.

17 Just to cite a little bit of law, your Honor. In a
18 wire fraud prosecution, the Second Circuit has said in United
19 States v. Kim, 1246 F.3d 186, that wire fraud is a continuing
20 offense under Section 3237 of the United States Code, Section
21 Title 18, and may be prosecuted in a district where wire
22 transmission began and continued.

23 So it is a very straightforward application of wire
24 fraud venue. It doesn't have anything to do with driving. And
25 the instruction that we have a proposed is the law. It's

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1 correct. What Mr. Dratel was arguing is incorrect both on the
2 law with respect to wire fraud and the same law would apply to
3 health care fraud, which talks about wire transmissions in
4 furtherance of the fraud. It is exactly what was alleged, and
5 it's what we have proven.

6 THE COURT: Thank you.

7 Mr. Dratel.

8 MR. DRATEL: Just that the indictment does not say
9 that they are relying on 112. The indictment is sufficient in
10 the context of it says through the Southern District of New
11 York. It doesn't say that they are going to rely on 28 U.S.C.
12 112, which we would have objected to if that was notice of
13 where it was.

14 MR. WEDDLE: Your Honor, we proposed this very
15 instruction to the defense and to the Court on July 8. There
16 was no motion made before trial. There is no secret about this
17 theory. It's always been the theory. It was alleged in the
18 indictment, and the argument has been waived.

19 MR. DRATEL: Your Honor, it hasn't been waived, Novak
20 is the case. It has not been waived.

21 THE COURT: On this issue I will just indicate,
22 Mr. Dratel, tell it to the judges up above.

23 MR. DRATEL: Yes, I understand, your Honor.

24 We will never get there.

25 THE COURT: All right.

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1 MR. DRATEL: The one issue that is not in there, and I
2 have a couple of possible places where it could go, is a
3 repetition of the Court's instruction with respect to the
4 Dr. Ajemian evidence. I think it needs to be repeated
5 particularly in the context of the Court instruction with
6 respect to coconspirators and acts and things like that.

7 So there's limitations on that evidence that I think
8 need to be repeated. I was looking at, page 46 I think is a
9 possible spot for it. If I can go back there. Yes, page 46 or
10 47. Another possible spot is page 61.

11 THE COURT: All right.

12 MR. DRATEL: Which is where you talk about drawing
13 inferences from evidence of what the defendants said and all
14 the evidence or lack of evidence in the case.

15 So either place would be acceptable to us, your Honor.

16 THE COURT: All right. I think that is appropriate.

17 MR. DRATEL: Thank you, your Honor. That is all I
18 have, your Honor.

19 THE COURT: All right.

20 MR. DRATEL: Thank you.

21 THE COURT: Thank you.

22 Mr. Jackson.

23 MR. JACKSON: Yes, Judge. I endorse my colleagues'
24 presentation regarding the indictment. I support them and I'm
25 about to support Mr. Ryan's.

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1 I just have a couple for you, Judge. I will be the
2 briefest of the three.

3 One is on page 6, just one technical point, two
4 technical points, and then one substantive point, Judge.

5 I just want to make sure we get Ms. Baran's gender
6 right. The first thing is, if we turn to page 6 of the
7 indictment -- I'm sorry, Judge, the jury charges, and on page
8 6, and I will be guided by your judgment as to this, this is
9 not the gender issue. This says on page 6, if you look at the
10 first, second -- third paragraph, "Although the defendant has
11 been indicted, you must remember that an indictment" --

12 I don't remember whether your Honor wants to relate
13 that to the defendants or keep it separate and independent. It
14 is all good.

15 MR. DRATEL: May I make a suggestion, your Honor.

16 (Continued on next page)

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1 THE COURT: These are conforming changes that we can
2 make throughout. Remember, this is a draft and sometimes we
3 take drafts --

4 MR. DRATEL: Sure, Judge.

5 THE COURT: -- go over them until we have the first
6 charge conference. So these are changes that you'll properly
7 point out and we'll conform.

8 MR. DRATEL: Your Honor, may I just make a suggestion,
9 because I had noted this but I thought it was one that was not
10 substantive. But I would just say instead of "the," because we
11 do want to keep the individualized aspect of it, I would put
12 "although each defendant has been indicted, you must remember,"
13 and then at the end, "each defendant has pleaded not guilty."
14 And then in the next paragraph, "as a result of each
15 defendant's plea." And that's all, that's how I would resolve
16 that.

17 MR. JACKSON: I support that, Judge.

18 THE COURT: Instructive.

19 MR. WEDDLE: Your Honor, I had marked a number of
20 these kind of conforming changes.

21 THE COURT: Those are the kinds I'd like you to hand
22 up to the clerk.

23 MR. JACKSON: And then finally on page 18, it
24 references how Ms. Baran testified. It just is an indication
25 of how he testified and his testimony. It should be she.

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1 Those are conforming.

2 A substantive change, Judge, page 82. Eighty-two
3 addresses the issue of conscious avoidance. I don't see any
4 basis for a charge of conscious avoidance. I don't know about
5 any testimony that relates to anybody consciously avoiding
6 anything.

7 As it relates to Ms. Baran, certainly there was
8 testimony that the job, both her job at the Railroad Retirement
9 Board as well as her job when she left as a consultant did not
10 involve her getting involved in whether or not the person was
11 disabled or could be disabled, but it's their right to apply.
12 And her job, I believe, as a consultant is to ensure that
13 everything is complete, that the information is there and not
14 to pass judgments on whether or not they hobbled into her
15 office, had a cane when they came into her office, were in a
16 wheelchair in the office or otherwise had three people assist
17 them to her office.

18 So her job is not to pass judgments as to their
19 disabilities. It was not her job at the Railroad Retirement
20 Board and it was not her job as a consultant. In fact,
21 witnesses have affirmatively indicated that there's no space
22 for that. There's nothing in the application that speaks to
23 the RRB claims representative passing judgment on someone's
24 disability. Their sole job is to ensure the completeness of
25 the application. And her job, again, as a consultant, was to

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1 ensure the completeness and thoroughness of the application
2 with no independent duty to verify any medical condition.

3 And based upon that, Judge, and based upon her not
4 having any duty, I think it would be misleading to the jury to
5 suggest that she might have known or should have known or could
6 have known. She's relying in good faith on what's represented
7 to her. And to the extent they had medical forms
8 substantiating their injuries and to the extent that they
9 answered her questions as she went over the application, she
10 did her job. And so, therefore, your Honor, I don't think a
11 conscious avoidance charge would be applicable.

12 And with that stated, I have nothing further and I
13 will let my other colleague, Mr. Ryan, deal with some other
14 matters which I will endorse.

15 THE COURT: Before we do that, Mr. Weddle, any
16 response to Mr. Jackson's concern?

17 MR. WEDDLE: Well, the evidence, of course, has shown
18 exactly the opposite of what he said. And I think that the
19 conscious avoidance charge is totally warranted here. For
20 Marie Baran to say that dozens and dozens of people came to her
21 while they were working and working overtime, preplanning that
22 they were going to become disabled in the future, and that she
23 then supposedly relied on what they said to her and she's just
24 an innocent duped in this process when she fills out
25 application after application to come out with exactly the same

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1 answers is her way of saying she didn't know that these
2 applications were false.

3 And I think she obviously did know because her
4 arguments and her testimony was absurd on these points, but
5 also it's a classic case of conscious avoidance if she's not
6 trying to know. She's not asking people can you do your job.
7 She's asking people, oh, you say that it's easy for you to eat,
8 you know, what about when you eat spicy food.

9 I think it's well-warranted and totally appropriate
10 here.

11 MR. JACKSON: Judge, I just want to respond to some
12 characterizations about absurdities and everything else. I'm
13 not sure what trial Mr. Weddle sat through, but the one, Judge,
14 I sat through for the last few weeks indicated that there was
15 no burden whatsoever -- and this was confirmed by their
16 witnesses, our witnesses -- there's no burden at all on any
17 person who is intaking applications to make any medical
18 assessment. Someone represents information to that person and
19 as a result of that, they place it on the application and it
20 matches all the medical evidence.

21 And with regard to the absurdity of her testimony,
22 certainly his cross-examination didn't seem to point to
23 anything absurd, but we're not talking about credibility
24 questions. Those are for a jury to determine. We're talking
25 about evidentiary questions, and there has been no evidence

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1 whatsoever which would be suggestive of somebody turning the
2 other way.

3 Finally, as to the point about planning disabilities,
4 he can argue what he wants. What I heard was people coming in
5 to see her regarding retirement issues, and as a result of
6 that, her doing an authorization form in contemplation of their
7 retirement and then them subsequently giving her medical
8 information dealing with disability.

9 So he'll spin or whoever does their closing will spin
10 the evidence in any hundreds of ways and point to passports and
11 travel -- we'll get to that later this afternoon -- that have
12 no bearing on the facts. But, Judge, since we're speaking
13 about the facts here, I think there should have been some facts
14 elicited concerning somebody who looked the other way, who knew
15 something was going on and didn't do anything about it.

16 Her obligation, again, just for clarity purposes, both
17 when she was at the Railroad Retirement Board for 18 years,
18 what she trained and what she trained others on was to ensure
19 the completion of the application. There are no doctors at the
20 RRB local office in Westbury that can tell whether somebody is
21 disabled, that can tell whether somebody had a back problem.
22 There's not their job, not their issue, not within her purview
23 or scope. With respect to her consultant job, again, Judge,
24 not within her purview, scope, or anything else.

25 So to make the argument that she consciously avoided

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1 something that was not her duty to detect or otherwise report I
2 think misleads this jury and leads to confusion and is not
3 appropriate or warrant that that charge being included.

4 THE COURT: OK. Thank you.

5 Mr. Ryan.

6 MR. RYAN: Of course, Judge, every treatise on jury
7 instructions urges the Court to tailor the instructions to the
8 case for the jury. So strictly boilerplate might have been
9 used in another case, might have been approved, just as a
10 general observation. My submission is that these charges
11 should be submitted concerning this case for this jury.

12 The first observation I have is the accomplice charge
13 on 21 and 22, I know your Honor doesn't want to deal with other
14 submissions so I'll reserve it. But in my opinion, I'm going
15 to respectfully suggest that your Honor consider the
16 instruction that a guilty plea of a witness is not evidence of
17 a defendant's guilt. That was a submission we made prior to
18 trial.

19 I'm going to continue on, Judge.

20 THE COURT: I'm sorry, Mr. Ryan, where on 21 are you
21 referring to?

22 MR. RYAN: It's not in here. It has to be cared for in
23 wherever you think it's appropriate. The charge that is Sand
24 7-10, *U.S. v. Prawl*, that in essence says that guilty pleas of
25 witnesses -- I think we had at least five in this case -- while

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1 properly considered for impeachment, may not be considered as
2 evidence of the defendant's guilt.

3 So Maher, who consulted with Mr. Rutigliano, and
4 Mr. Parlante, who consulted with Mr. Rutigliano, who pled
5 guilty, their pleas are not evidence of Mr. Rutigliano's guilt,
6 anywhere with respect to the discussion of accomplice
7 testimony, Judge.

8 THE COURT: All right. Mr. Weddle, do you have any
9 comment on that?

10 MR. WEDDLE: It doesn't sound wrong to me, your Honor.
11 I'd like to look at the standard charge.

12 THE COURT: I think that is a fairly standard charge,
13 and I would be inclined to accept it, Mr. Ryan.

14 Next.

15 MR. DRATEL: Your Honor, also if it applies across the
16 board.

17 THE COURT: Yes, it applies across the board. And, in
18 fact, one possibility might be to fold it into the limiting
19 instruction pertaining to Mr. Ajemian. All right.

20 Mr. Ryan.

21 MR. RYAN: On page 39, this is a general observation
22 discussing conspiracy. The conspiracy in this charge as
23 drafted is the jurors have to find whether there was an
24 agreement to commit mail fraud, wire fraud, and healthcare
25 fraud, but what is the offense? The most essential element of

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1 those three offenses if you're going to agree to commit those
2 offenses is intent to defraud the RRB, intent to defraud the
3 United Healthcare agency.

4 So my suggestion is that with respect to the
5 references to mail, wire, and healthcare fraud, that a clause
6 be inserted "with intend to defraud the RRB and United
7 Healthcare." You can't agree to commit a crime unless you know
8 the elements of the crime. In this case it's whether you
9 ripped off the RRB and United Healthcare agency. That's what
10 the case is all about. So the general generic language here
11 doesn't convey that concept to the jurors, and I respectfully
12 submit that your Honor consider that as an insertion.

13 THE COURT: Mr. Weddle.

14 MR. WEDDLE: I just think it's well covered throughout
15 your Honor's charge. I don't think it needs to be on every
16 page.

17 MR. RYAN: If I can go back, Judge, to the reasonable
18 doubt charge on 27.

19 THE COURT: Twenty-seven.

20 MR. RYAN: Yes. There's nothing in this charge that
21 says what a reasonable doubt is. And every charge I'm familiar
22 with, including Sand, says it's a doubt based upon reason and
23 common sense and that's a phrase. It's a doubt based upon
24 reason and common sense. I urge your Honor to consider, it
25 says the government doesn't have to prove or does have a burden

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1 of proving beyond a reasonable doubt, but the charge doesn't
2 tell this jury what a reasonable doubt is.

3 THE COURT: That's a fairly standard instruction.
4 It's here. If you want it on page 27, we'll put it on page 27.

5 MR. RYAN: So I ask your Honor to consider Sand 4-2
6 and the phrase it's a doubt based upon reason and common sense.

7 MR. WEDDLE: I thought your Honor covered it.

8 THE COURT: It's covered. Mr. Ryan asks that it be on
9 27, but it is covered.

10 MR. WEDDLE: I think it was covered before that
11 charge.

12 THE COURT: Page 8.

13 MR. RYAN: I plead guilty to carelessness and
14 inattention.

15 MR. DRATEL: It doesn't say common sense. It does say
16 it. It says it is a doubt based upon reason and common sense.

17 THE COURT: Straight out of Sand.

18 MR. RYAN: I'm sorry.

19 Seventy-two, which deals with Count 33 where the
20 prosecutor told you that we're only going to rely on one
21 theory, not two theories, magnanimous as that may seem, the
22 fact of the matter is that their suggestion is relieving them
23 of burdens of proof concerning this element. Seventy-two,
24 Judge.

25 THE COURT: What's your comment?

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1 MR. RYAN: My comment is with respect to this count,
2 your Honor should leave it as is because the government's
3 burden is to prove all of the elements listed on 73 and 74.

4 THE COURT: The government's issue was that it was
5 charging, it made original reference to two theories, and now
6 it is saying that it wants to pursue only on one theory. I'm
7 not sure how your comment cuts on that. The government is
8 effectively dropping one theory.

9 MR. RYAN: And it's dropping the second theory which
10 has the five elements.

11 MR. WEDDLE: That's not correct, your Honor.

12 I think we were proposing, on page 72, your Honor
13 quotes the statute and it has two numbered subsections. And I
14 think we were going to just forego instructing the jury on the
15 first numbered subsection, which is one of the two theories
16 charged in the indictment, and only instruct the jury on the
17 second subsection, which your Honor's draft does. Your Honor
18 doesn't instruct according to the five elements in Sand on the
19 first subsection.

20 We've proven both. If Mr. Ryan wants both of these
21 things to be instructed to the jury, that's fine. We're just
22 going to be here for a little bit longer.

23 MR. RYAN: I don't see in the first theory five
24 elements on 72 or 73. I see them on 73 and 74. Maybe I missed
25 something.

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1 MR. WEDDLE: Your Honor, that's the point. With
2 respect to the language in the statute which talks about
3 falsifying, concealing or covering up by any trick, scheme, or
4 device a material fact, there is a set of five elements
5 describing that theory of Section 1001. Your Honor's charge
6 doesn't include those elements. We think that's a helpful and
7 efficient way to do this. We'll just drop that theory. It's
8 pretty duplicative of the other theory. The facts are the
9 same. We've proven them. We don't think we need to go through
10 those elements.

11 If Mr. Ryan would like to go through those five
12 elements and then go through the five elements of the second
13 theory that are already in the Court's charge, we're going to
14 be here longer during the charge to the jury. But I think it
15 doesn't change at the end of the day anything because we've
16 proven the exact same facts which satisfies either theory.

17 I think it's simpler to just eliminate the first
18 theory. It means your Honor wouldn't have to read that part of
19 the statute. We would eliminate it from the indictment, and
20 your Honor would only instruct on five elements rather than
21 five and then an alternate five elements for this count.

22 THE COURT: All right. Mr. Ryan, I think that that
23 makes eminent sense and simplifies and will save a lot of time.

24 MR. RYAN: I'll confess I'm very confused on this
25 item. We'll read your Honor's new draft and see.

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1 THE COURT: It may be because you didn't take into
2 account, as no one did until the government indicated that it
3 was dropping the first theory.

4 All right. Anything else?

5 MR. RYAN: On the issue of venue, I would move for a
6 judgment of acquittal on the failure of the government's proof
7 because even the stipulation talks in general abstract terms
8 about why in communications they normally pass through, but
9 there's no evidence here that the RRB disability checks that
10 were deposited into the Federal Reserve Bank of New Jersey --

11 THE COURT: Mr. Ryan, let me cut to the chase. Is
12 that a motion for reconsideration of the ruling that I made in
13 connection with Mr. Dratel's motion?

14 MR. RYAN: It certainly is.

15 THE COURT: Denied.

16 MR. RYAN: Thank you. I have submitted a venue
17 charge, request to charge, but I don't know if you want to
18 discuss it now or at another time.

19 MR. JACKSON: Judge, can I give you a chance to deny
20 mine?

21 THE COURT: Absolutely.

22 MR. JACKSON: I join in their application for venue.

23 THE COURT: OK.

24 MR. RYAN: The substantial contacts discussion on
25 venue is very relevant to this particular case, tailored to

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1 this case, which Judge Cedarbaum used in a case I can't
2 pronounce but cited to by Mr. Dratel, and our requested charge
3 has got it in there too.

4 So I'm going to ask your Honor to consider the request
5 to charges that we submitted yesterday, but I understand that
6 you want to have a redraft of this and perhaps upon reviewing
7 our request to charges on venue, you considered ours more
8 appropriate and tailored to this case.

9 THE COURT: All right. Thank you. If there's nothing
10 else, then.

11 MR. RYAN: Just one second, Judge.

12 THE COURT: Go ahead.

13 MR. RYAN: Of course, the conscious avoidance charge
14 is an invitation to convict Mr. Rutigliano on negligence. Two
15 witnesses -- Maher and Parlante -- had conversations with him.
16 And the government is going to argue that these forms, these
17 applications they submitted had some bizarre statements in it.
18 And if Mr. Rutigliano was careless or inattentive, negligent in
19 not cleaning it up before they were submitted by the applicant
20 to the RRB, the government is going to argue because of his
21 negligence he consciously avoided knowing what was in that
22 form. And that's a major argument I expect to hear from the
23 government in this case.

24 So the conscious avoidance charge should not be used
25 in a case, in my opinion, where negligent conduct can be

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1 converted into criminal conduct simply on that charge. The
2 government charge here is that it was an intentional effort to
3 defraud the RRB and United Healthcare agency.

4 So I urge your Honor to consider the danger of giving
5 a conscious avoidance charge in a case like this, particularly
6 where the government has all of these charts which have a
7 compelling, according to the government, inference to draw that
8 all of this was intentional. And giving a conscious avoidance
9 charge in this particular case tailored for this jury is an
10 invitation for the jury to convict a man based upon his
11 carelessness and negligence.

12 Mr. Rutigliano was a union official. He wasn't a
13 lawyer. He wasn't an astute educated person. And giving a
14 conscious avoidance charge in his case is an invitation for the
15 jury to convict.

16 THE COURT: All right.

17 MR. RYAN: Judge, I think I'm there. Thank you very
18 much for your patience.

19 THE COURT: All right. Thank you.

20 MR. DURKIN: Judge, I would join in that with Mr. Ryan
21 on a similar basis with respect to Dr. Barron's testimony
22 regarding Dr. Lesniewski. I think there is a risk of the poor
23 recordkeeping or negligent standard to get converted to a
24 criminal standard, and I just would endorse that.

25 THE COURT: All right. If there's nothing else, why

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1 don't we take a ten-minute break and then come back for the
2 instructions -- I'm sorry -- for the closing arguments.

3 MR. DURKIN: Judge, we have, I think we've reached a
4 stipulation. I have -- Mr. Weddle sent me an email this
5 morning. I converted what he sent me. I'm changing -- I'm
6 told we now have about six different definitions of gross
7 income to pick from, gross receipts, and I'm confident we'll
8 arrive at one, but if we could have maybe -- someone is on his
9 way with the copies now.

10 THE COURT: All right. Why don't we tell the jury
11 that we'll start at 11.

12 MR. DRATEL: Your Honor.

13 THE COURT: Let me come back to this issue and how we
14 introduce it, the issue of the stipulation and the Court's
15 understanding of the consequence.

16 Is it going to be introduced, Mr. Durkin, by you or by
17 the government and what?

18 MR. DURKIN: I had intended to read it. I can read
19 you what I've changed. It reads now:

20 If called as a witness, Lenny Konsker would testify as
21 follows:

22 He is a certified public accountant with the office in
23 Hicksville, New Jersey. I'm sorry, it says New York. I read
24 New Jersey. And the tax preparer for Peter J. Lesniewski, MD,
25 P.C., and Peter J. Lesniewski and Linn C. Lesniewski.

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1 Defendant Exhibits L-24-A through L-24-F -- and those are the
2 form 11 or here's what it says -- are true and correct copies
3 of form 1120S, U.S. income tax return for an S corporation,
4 filed in the respective years for Peter J. Lesniewski MD, P.C.,
5 which is the corporate entity owned by Peter J. Lesniewski
6 through which he did business.

7 DX L-24 is a summary chart reflecting gross receipts
8 line (Line 1a) on the corporate tax returns (Form 1120S) of
9 Peter J. Lesniewski, MD, P.C., the total income line from the
10 personal tax returns of Peter J. Lesniewski and Linn C.
11 Lesniewski (Line 22) on Government Exhibit 1500-1504, as well
12 as the United Healthcare payments to Dr. Lesniewski for Long
13 Island Railroad employees (Government Exhibit 24) for the
14 respective years 2003 through 2008.

15 And here's -- this is the sentence that may change
16 because this may not be the correct CFR, but it is a gross
17 receipts definition of CFR.

18 THE COURT: Whatever that is, is that --

19 MR. DURKIN: I'm sorry?

20 THE COURT: Whatever the definition is that you
21 ultimately adopt.

22 MR. DURKIN: Yes, and that's just one sentence. And
23 then this is -- I believe I modified what Mr. Weddle said, but
24 I think it's in substance what he intended.

25 Various expenses are then deducted from the gross

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1 receipts, (Line 7 through 19) resulting in either ordinary
2 income or loss from trade or business activities (Line 21).
3 The profit or loss from the trade or business, as well as wages
4 or other income paid to Peter J. Lesniewski, is reflected on
5 the individual tax returns (Form 1040) for Peter Lesniewski and
6 Linn Lesniewski (GX 1500-1504, Lines 7, 21, and 22).

7 THE COURT: All right. Mr. Weddle.

8 MR. WEDDLE: Your Honor, that sounds fine to me.

9 There may be an issue lurking in the definition of gross
10 receipts because as your Honor will recall, one of the issues
11 that we identified with respect to this is that the accountant
12 used the bank records for the S corporation in order to prepare
13 the tax returns. We've looked at those bank records and we
14 don't see repeated or substantial cash deposits.

15 So we're not going to make an argument about it, but I
16 don't want defense counsel to make an argument which I think is
17 not supported by the evidence in the record, which is that all
18 of the narrative payments are included in the gross receipts
19 figures. I don't think he can say that's true, and so I don't
20 think he should make an argument that it is, but that's the
21 issue that I see lurking.

22 The language that I proposed was that the gross
23 receipts figure on the tax returns was prepared from the bank
24 records of the P.C. It doesn't have to be that language. It
25 could just be a generalized description of gross receipts, but

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1 the evidence that's in this trial does not confirm that the
2 narrative payments that were made in cash actually ended up on
3 the gross receipts line of the tax returns.

4 MR. DURKIN: As long as the government is willing not
5 to argue that they did not, then I'm willing to say I'm not
6 going to argue that it was all there.

7 THE COURT: All right. Let's understand that. Let's
8 also understand the consequences of the stipulation coming in
9 through Mr. Durkin on behalf of Dr. Lesniewski. My
10 understanding is that this material is being introduced as a
11 form of completing the record.

12 MR. DURKIN: Yes.

13 THE COURT: And not of opening the door for the
14 government to bring in the malpractice and insurance, loss of
15 insurance issues.

16 MR. DURKIN: That was my understanding.

17 THE COURT: Mr. Weddle, is that your understanding?

18 MR. WEDDLE: Based on this stipulation, we don't
19 intend to introduce that evidence. But I wouldn't want to see
20 a repeat of some of the arguments that we saw in opening or for
21 someone to say that there's no motive here to commit the crime
22 in summation. I think that the defense should choose their
23 words carefully and they should not open, you know, basically
24 try to open a door that has been closed by their decisions
25 about what to put on and not put on and our decisions based on

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1 their representations.

2 MR. DURKIN: As long as the gander and the goose get
3 the same treatment, it's fine with me. If they go into that in
4 their opening before I argue that somehow United Healthcare
5 shows how dependent he was on this whole scheme, then I assume
6 they've opened the door for me on that. I can't imagine that
7 they're going to do that in light of what we've talked about.

8 MR. WEDDLE: Maybe I should be a little more precise,
9 your Honor. I think we are going to argue that and I
10 understand Mr. Durkin is going to respond to that in the way
11 that we've discussed related to these tax returns and the gross
12 receipts figures.

13 THE COURT: That was my understanding, Mr. Durkin.

14 MR. DURKIN: That's fine.

15 MR. WEDDLE: It's the specific language that we talked
16 about in opening about --

17 THE COURT: There are factual differences about what
18 those numbers mean, and you can argue your factual -- the
19 factual inferences you think the jury can make from them.

20 MR. DURKIN: That's fine.

21 THE COURT: All right.

22 MR. DRATEL: Your Honor, to save time, since we know
23 what the contours of the remainder of the evidence will be, so
24 we don't have to send the jury out or have a side bar, I'd like
25 to renew our Rule 29 incorporating the stipulation so we can

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1 get that out of the way and not have to interrupt once the jury
2 comes back.

3 THE COURT: All right. If there are other Rule 29
4 motions at this point, just put them on the record.

5 MR. RYAN: So move.

6 MR. JACKSON: Ditto, Judge.

7 THE COURT: All right. I've considered the Rule 29
8 motions, as I considered them earlier, based on the standard
9 applicable to Rule 29 motions, which the evidence must be
10 viewed in the light most favorable to the government. I
11 believe that there is sufficient evidence on this record to
12 allow the case to proceed to the jury and, therefore, I deny
13 the motions.

14 Let's tell the jury we'll call them in at 11.

15 Now, the government indicated that it would need
16 something over an hour for closing arguments.

17 MR. WEDDLE: I apologize, your Honor. Ms. Friedlander
18 is not here right now. She's been polishing and working on her
19 summation. So I'm not in a better position than she was to
20 give estimate. I think that it's going to be the same,
21 somewhere below an hour and a half. I think she's been trying
22 to shorten it. But as soon as she arrives, which I think will
23 be momentarily, we can find out more specifically.

24 THE COURT: All right. The government will have
25 roughly an hour and a half. I would suggest that the defense

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1 get together and work out a schedule on which you will have
2 among the three of you two hours. All right?

3 MR. JACKSON: Thank you, Judge.

4 MR. RYAN: All right.

5 (Recess)

6 THE COURT: Is the government ready to proceed to
7 closing arguments?

8 MS. FRIEDLANDER: Yes, your Honor.

9 THE COURT: All right. You may bring in the jury.

10 Before we do, let me come back to the question of the
11 instructions, the issue of the conscious avoidance. I think
12 that it is a difficult and close issue. I'm not ready to rule
13 on it at the moment, so I would ask the government not to make
14 reference to that until the issue is fully decided.

15 MS. FRIEDLANDER: No problem, Judge.

16 THE COURT: All right.

17 (Jury present)

18 THE COURT: Welcome back. Thank you. Be seated.

19 Before we begin, counsel please approach for just one
20 moment.

21 (At the side bar)

22 THE COURT: All right. Now, because I'm aware of the
23 defendants' sensitivity about the issue of Mr. Marks, I've
24 asked my clerk to prepare what I call a sleep log in which he
25 will note times, which started yesterday and until I give

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1 instructions, in which what I consider Mr. Marks' distracting
2 and inattentive conduct will be indicated. This is all in
3 order to establish a record, but the Court's attention remains
4 on that issue.

5 MR. DURKIN: Can we still object, but I get it.

6 THE COURT: Of course. Even if you see the evidence.
7 All right.

8 (In open court)

9 THE COURT: Mr. Durkin.

10 MR. DURKIN: Your Honor, we have one final
11 stipulation, as we said last night.

12 The parties have agreed that if called as a witness,
13 Lenny Konsker would testify as follows:

14 Mr. Konsker is a certified public accountant with
15 offices in Hicksville, New York, and the tax preparer for Peter
16 J. Lesniewski, MD, P.C., and Peter J. Lesniewski and Linn C.
17 Lesniewski. Defendant's Exhibits L-24-A through L-24-F are
18 true and correct copies of Form 1120S, U.S. income tax return
19 for an S corporation, tax returns filed in respective years for
20 Peter J. Lesniewski MD, P.C., which is the corporate entity
21 owned by Peter J. Lesniewski through which he did business.

22 Defendant's Exhibit L-24 is a summary chart reflecting
23 the gross receipts line, (Line 1a) on the corporate tax returns
24 (Form 1120S) of Peter J. Lesniewski, MD, P.C., the total income
25 line from the personal tax returns of Peter J. Lesniewski and

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1 Linn C. Lesniewski (Line 22) on Government Exhibit 1500-1504,
2 as well as the United Healthcare payments to Dr. Lesniewski for
3 Long Island Railroad employees (Government Exhibit 24) for the
4 respective years 2003 through 2008.

5 According to the IRS, gross receipts are the total
6 amounts the organization received from all sources during its
7 annual accounting period, without subtracting any cost or
8 expenses. Various expenses are then deducted from the gross
9 receipts, (lines 7 through 19) resulting in either ordinary
10 income or loss from trade or business activities (Line 21).
11 The profit or loss from the trade or business, as well as wages
12 or other income paid to Peter J. Lesniewski, is reflected on
13 the individual tax returns (Form 1040) for Peter J. Lesniewski
14 and Linn C. Lesniewski (Government Exhibits 1500-1504, Lines 7,
15 21, and 22).

16 Judge, if I could just publish them quickly.

17 THE COURT: You may.

18 MR. DURKIN: This is 24-A. And I'll just publish
19 24-F, which is 2008. They're virtually, other than the
20 numbers, the forms are all the same.

21 And then the actual summary chart to which we
22 referred, L-24, I'll publish now, but I may need Mr. Jackson's
23 assistant to help me as I'm not very talented. Better than I
24 thought. How about that.

25 This is L-24, and it's self-explanatory, as the

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1 stipulation says.

2 THE COURT: All right. Thank you.

3 MR. DURKIN: Thank you, Judge.

4 THE COURT: All right. With that introduction which
5 was presented --

6 MR. DURKIN: I'm sorry, Judge. I would move to
7 introduce the exhibits.

8 THE COURT: Government?

9 MS. FRIEDLANDER: No objection.

10 THE COURT: Admitted without objection.

11 (Defendant's Exhibits L-24, L-24-A through L-24-F
12 received in evidence)

13 THE COURT: With that introduction of that evidence,
14 defendant Peter Lesniewski's case has rested.

15 And, consequently, we're ready to proceed to the next
16 phase of the trial which is the presentation of the parties'
17 closing arguments.

18 As I will instruct the jury during the full
19 instructions, as I have indicated in the preliminary
20 instructions, closing arguments are not evidence. Closing
21 arguments are the parties' explanation of what they believe the
22 evidence has established and what inferences they believe you
23 can reasonably draw from the evidence as they believe it has
24 come in.

25 So, government.

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Summation - Ms. Friedlander

1 MS. FRIEDLANDER: Thank you, your Honor.

2 Good morning.

3 Peter Lesniewski, Marie Baran, and Joseph Rutigliano
4 helped hundreds of Long Island Railroad employees lie to get
5 disability benefits from the federal government, disability
6 benefits these employees didn't deserve, disability benefits
7 that were supposed to be a safety net for truly disabled
8 people. They lied again and again, day after day, and they
9 helped countless Long Island Railroad employees scam the
10 federal government so they could make a quick buck. These
11 defendants were at the center of the fraud, they were engines
12 of the fraud, and each of them profited from their fraud in
13 multiple ways for years.

14 Ladies and gentlemen, this is the government's
15 summation. It's our chance to put all the evidence together to
16 show you how it proves that Baran, Lesniewski, and Rutigliano
17 are guilty beyond a reasonable doubt of committing fraud, a
18 simple, definitive fraud with employees of the Long Island
19 Railroad.

20 So let's talk about the fraud. There was a massive
21 fraud at the Long Island Railroad. Employees routinely claimed
22 they were disabled and couldn't work anymore and those were
23 lies. And the reason they lied is no mystery. They lied so
24 they could retire early and pad their pensions with disability
25 benefits, money they weren't entitled to, money that was meant

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Summation - Ms. Friedlander

1 to be a safety net for suffering people.

2 You have heard from and seen many people who told
3 those lies -- normal, healthy, and often active middle-aged
4 people. They told you that they lied about being unable to
5 work anymore, lied about being disabled just to pad their
6 wallets with the government's money, and then retire to lives
7 of golf, cycling, fitness, and travel.

8 Steven Gagliano told you he traveled the world on the
9 government's dime with disability benefits he never deserved.
10 Michael Stavola told you that he played golf practically every
11 other day while on disability. You also heard from Robert
12 Dunaj, a witness who applied for disability and then got cold
13 feet, withdrawing his application after the New York Times
14 published an article about the fraud because Dunaj knew what he
15 was doing was wrong and he knew, he saw that the fraud was
16 coming to light.

17 You also heard from Regina Walsh, who told you that
18 she too lied about being disabled to get disability money she
19 knew she never deserved. Ms. Walsh told you that she hesitated
20 to apply at every step of the process because she knew what she
21 was doing was wrong and that for her, testifying here before
22 you was a way to begin to make things right.

23 These witnesses told you not just about their own
24 fraud, but about a massive culture of fraud at the Long Island
25 Railroad. Employees taught each other that at least a year

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Summation - Ms. Friedlander

1 before they planned to retire, they should start seeing one of
2 three corrupt doctors: Dr. Parisi, Dr. Ajemian, and the
3 defendant, Peter Lesniewski. These doctors for money would
4 willingly create a paper trail, a paper trail, as Long Island
5 employees called it, a paper trail of needless visits and tests
6 to create the false appearance that the employees were
7 suffering from serious conditions that were getting worse and
8 worse and couldn't effectively be treated.

9 On top of that, the witnesses told you that it was
10 common knowledge and openly discussed that you could pay
11 particular people, including the defendants -- Marie Baran and
12 Joseph Rutigliano -- to complete their disability applications
13 filling them with lies.

14 Chris Parlante told you that he paid Rutigliano \$1,000
15 to complete his application because he knew Rutigliano would
16 say whatever needed to be said to get Parlante the disability
17 money that he wanted. Regina Walsh told you that she watched
18 with her own eyes as Marie Baran filled her application with
19 lies.

20 Witness after witness described the lies that
21 Rutigliano and Baran put in their applications. And remember,
22 this disability application is not complicated. Mr. Jackson
23 tried to compare Marie Baran to a tax preparer who completes
24 people's federal income tax returns. Are you kidding me? The
25 application asks the most basic questions: What is your job?

D7VLLES2

Summation - Ms. Friedlander

1 What things could you do in a normal day? Is it easy, hard, or
2 impossible for you to stand, sit, walk, dress yourself, bathe
3 yourself? Any legitimately disabled person could answer those
4 questions easily without paying a stranger a thousand dollars
5 cash to answer for them.

6 And you have heard that the employees maximized the
7 proceeds of their fraud every which way. On top of bilking the
8 government for bogus disability benefits, witnesses told you
9 that it became common knowledge that they could bilk insurance
10 companies by taking out disability insurance before they
11 retired. That way, when they falsely claimed to be disabled
12 upon retirement, they could also cash in on the disability
13 insurance. Witness after witness told you that this disability
14 insurance scheme was openly discussed by LIRR employees.

15 (Continued on next page)

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D7vnles3

Summation - Ms. Friedlander

1 Gary Supper and Michael Stavola both told you that
2 they engaged in this scheme taking out disability insurance as
3 they planned their bogus disabilities and cashing in on that
4 insurance when they filed their phony disability claims with
5 the government.

6 Stavola told you that he pocketed almost \$50,000 by
7 cashing in on disability insurance that he took out because he
8 knew he was planning a fake disability.

9 Gary Supper told you he cashed in to the tune of over
10 \$40,000.

11 You also know what a scam this was because as you
12 heard Long Island Rail Road employees worked overtime, huge
13 amounts of overtime leading up to the day they claimed to be
14 disabled.

15 Witness after witness told you they did that because
16 their pensions were based on the amount they earned in the few
17 years before they retired, so they worked as much as possible
18 in those years.

19 Steven Gagliano, Gary Supper, Michael Stavola, Chris
20 Parlante and James Maher all told you that they worked
21 thousands of hours of overtime, and it was same kind of work
22 they did all week long. They worked overtime right up until
23 they applied for disability because they were fully capable of
24 doing their jobs.

25 Of course you know that Joe Rutigliano and Marie

D7vnles3

Summation - Ms. Friedlander

1 Baran's husband, Gus Baran, did the same thing, and their
2 overtime records are in evidence.

3 Disabled?

4 These people were not in declining physical condition.
5 They were not even pretending to be. They were working more
6 than they ever did because they were fully capable of working.
7 Filing for federal disability benefits was just a part of their
8 retirement plan.

9 You learned from witnesses that not only did they plan
10 what year they were going to claim to become disabled, they
11 even planned the time of year in which they were going to claim
12 to be disabled.

13 The witnesses told you that employees made more money
14 if they retired in the second half of the year, because if they
15 waited until then they could cash in on their vacation time for
16 that year and the following year.

17 The witnesses told you they all claimed to be disabled
18 in the second half of the year for that reason. You even saw
19 in Steven Gagliano's calendar how he marked off the day in his
20 retirement year when he had worked 100 days and could retire
21 making a false disability claim and collecting his vacation
22 payout for the following year.

23 Ladies and gentlemen, what all of these witnesses have
24 told you about their fraud and the culture of fraud at the Long
25 Island Rail Road is corroborated by the numbers.

D7vnles3

Summation - Ms. Friedlander

1 Robert Murray, the MTA auditor who you heard from in
2 this trial, showed you the data on employees retiring on
3 disability at the Long Island Rail Road.

4 Let's look at that again.

5 From 1998 to 2011 over 3800 employees retired from the
6 Long Island Rail Road and over 3,000 of them obtained federal
7 disability benefits when they retired.

8 As you can see, that is 79 percent of all Long Island
9 Rail Road employees over time. These are staggering numbers.
10 The defense lawyers have been saying, Well, railroad work is
11 difficult, railroad work is bruising. These aren't just manual
12 laborers.

13 MR. DURKIN: We object, Judge. The defense lawyers
14 didn't say anything.

15 THE COURT: Sustained.

16 MS. FRIEDLANDER: This is almost all employees of the
17 entire Long Island Rail Road railroad system, including white
18 collar workers in offices. People like Regina Walsh, who
19 worked in human resources. People like Robert Dunaj who worked
20 in a call center.

21 You also know these huge numbers have nothing to do
22 with the nature of the work at the Long Island Rail Road
23 because you saw these numbers compared to disability rates at
24 the Metro-North Railroad.

25 Mr. Murray told you that the Long Island Rail Road and

D7vnles3

Summation - Ms. Friedlander

1 the Metro-North Railroad are identical in every meaningful way
2 except one.

3 Let's take a look at their comparative disability
4 rates. You can see here a year-by-year comparison of the
5 comparative disability rates.

6 On average, from 1998 to 2011, while 79 percent of all
7 Long Island Rail Road employees retired on disability, just 21
8 percent of Metro-North Railroad employees went out on
9 disability.

10 Can we see the bar comparison.

11 This is the same data, just presented year by year.
12 These are staggering differences.

13 Metro-North and the Long Island Rail Road are
14 essentially identical railroads, as Mr. Murray told you. They
15 both take commuters back and forth between Manhattan and
16 outlying areas. They have the same purpose. They have
17 virtually the same number of employees. They have the same
18 electric and diesel trains and equipment.

19 Why is there such a huge difference in the disability
20 rates among their employees?

21 The reason, as you now know, is that Long Island Rail
22 Road rules created a unique incentive for employees to commit
23 this fraud.

24 Unlike Metro-North employees, Long Island Rail Road
25 employees could retire with pensions at the relatively young

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Summation - Ms. Friedlander

1 age of 50 if they had worked at the railroad for at least 20
2 years. But at 50, their pension would only equal about half
3 their salary. As the witnesses told you, the employees wanted
4 to retire at 50, but not on just half their salary.

5 What the Long Island Rail Road employees figured out
6 is a way to get more money when they retired at 50. They
7 figured out that they could retire at the young age of 50 with
8 their Long Island Rail Road pension equaling about half their
9 salary and then they could fake a disability to get federal
10 disability benefits that equaled just about the other half of
11 their salary.

12 That is the fraud that witness after witness has
13 described, and it's the fraud that the numbers we just looked
14 at show.

15 It is a fraud that has nothing to do with railroad
16 work being difficult. You know that because the Long Island
17 Rail Road disability rate is nearly four times higher than the
18 rate at Metro-North, an identical commuter railroad serving New
19 York City.

20 You can also see from the data that, just as the
21 witnesses told you, Long Island Rail Road employees were
22 planning not just the year but the time of year in which they
23 would falsely claim to be disabled.

24 Can we see 22-C.

25 This shows you the month of retirement of Long Island

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Summation - Ms. Friedlander

1 Rail Road employees who went out on disability. This is not
2 just regular retirements. This is people going out on
3 disability from 1998 to 2011.

4 Why is this so powerful?

5 This shows you these people are not really becoming
6 disabled. They are just planning these disabilities like they
7 do any other retirement planning.

8 As your common sense tells you and as Bob Murray told
9 you, if the people are really becoming disabled you would
10 expect them to leave at all times of the year. There is no
11 rhyme or reason to the time of year when someone becomes
12 disabled.

13 But that's not what happened at the Long Island Rail
14 Road, as you can see from these numbers. People claimed to be
15 disabled in the second half of the year because they made more
16 money that way.

17 How else do you know this was a huge fraud and that
18 people were lying when they said they couldn't do their jobs
19 anymore?

20 Look at what people did after they went out on
21 disability.

22 Michael Stavola played 18 holes of golf practically
23 every other day until he was arrested and lost his disability
24 benefits. What did he do then? He got a job. He got a job as
25 an electrician. It was the same job that he had at the

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Summation - Ms. Friedlander

1 railroad, and he still is working today. He wasn't disabled.

2 Steven Gagliano while collecting disability benefits
3 ran five-kilometer races, traveled all over the world, climbed
4 Mt. Kilimanjaro in Africa. Not only are these people capable
5 of doing their jobs, as they told you, as your eyes and your
6 common sense told you, some of them are in great physical
7 condition.

8 Chris Parlante has spent five days a week at the gym
9 lifting weights and doing cardio since going out on disability.

10 Regina Walsh told you she spends hours at the gym and
11 in fitness classes.

12 Robert Ellensohn is built like an oak tree and is a
13 volunteer firefighter to this day.

14 Disabled?

15 Steven Gagliano biked 400 miles in eight days on a
16 bike tour while on disability.

17 Here he is. That is Steven Gagliano finishing a
18 400-mile bike tour while he is on disability.

19 And, of course, Joe Rutigliano and Gus Baran, in a
20 league all by themselves because they are not just on
21 occupational disability, they are on total and permanent
22 disability. That means they are supposedly so physically
23 disabled that they are unable to do any job in the country.

24 Not able to do any job?

25 After he went on disability Rutigliano had a whole

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Summation - Ms. Friedlander

1 business that you have heard about in this trial completing
2 other people's disability applications for cash.

3 Leaving aside work, look what they did for fun.

4 Rutigliano and Gus Baran have been golfing year round
5 by traveling to their winter homes in Florida and playing in
6 New York all summer long, all funded by disability benefits
7 from the government that they never deserved.

8 In the face of all of this evidence, the defense keeps
9 suggesting there is no fraud at all. No one thought they were
10 doing anything wrong.

11 What they are really saying boils down to an argument
12 that it wasn't a crime and no one thought they were doing
13 anything wrong because everyone was doing it.

14 It's like saying that --

15 MR. DURKIN: I object to that, Judge. That is not
16 what any -- at least I said.

17 THE COURT: Overruled.

18 MS. FRIEDLANDER: It is like saying that if employees
19 of a bank were stealing the bank's money, it would be OK as
20 long as all the employees were doing it.

21 It is a ludicrous argument, it defies common sense,
22 and it flies in the face of what witness after witness has told
23 you.

24 They told you they lied to get money and they told you
25 they knew what they were doing was wrong. Of course, there was

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Summation - Ms. Friedlander

1 a fraud and these three defendants were right in the middle of
2 it. They made it possible.

3 Lesniewski, Baran, and Rutigliano together helped
4 hundreds of Long Island Rail Road employees get disability
5 benefits they didn't deserve, including many people who you
6 heard from in this trial.

7 They were at the center of the fraud and profited from
8 it for years. They want you to believe they had no idea, no
9 idea there was a fraud going on. That is ridiculous. The
10 proof of their guilt is overwhelming. Let's go one by one.

11 First, Peter Lesniewski.

12 Many witnesses told you that Lesniewski was one of the
13 three go-to doctors for disability, along with Ajemian and
14 Parisi. What the witnesses told you is corroborated by the
15 data.

16 The data shows that from 2004 to 2008, over 83 percent
17 of all Long Island Rail Road employees who got disability saw
18 Ajemian, Parisi or Lesniewski. In that same period, over 130
19 Long Island Rail Road employees got disability with
20 Lesniewski's help. That is a smaller number than Ajemian and
21 Parisi had, but without question it is a massive number.

22 How do you know that?

23 Just look at the fact that the 150 people who got
24 disability through doctors besides these three were seen by 150
25 different physicians. I'm sorry. I misspoke. Sorry. The 150

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Summation - Ms. Friedlander

1 people who got disability through doctors besides these three,
2 as you can see, were seen by 126 other doctors.

3 Lesniewski supported almost as many disability
4 applications as 126 other doctors combined. That is just in
5 the years 2004 to 2008.

6 How do you know that Lesniewski understood that all of
7 these people were coming to him for disability and not
8 treatment?

9 First, look at what they said to him. The LIRR
10 employees told him they wanted disability. They told him from
11 the get-go that they were seeing him because they were getting
12 ready to retire. One of them instructed Lesniewski in writing
13 to make up disabilities.

14 These LIRR workers didn't ask him for treatment. They
15 didn't pretend to be in serious pain. They told him they were
16 leading active lives.

17 They didn't hide anything from him. In his words and
18 his actions Lesniewski showed again and again that he
19 understood this was a sham and they were paying him to create a
20 phony paper trail.

21 From his very first visit, Chris Parlante told
22 Lesniewski that he was there because he worked for the Long
23 Island Rail Road and was planning to retire.

24 Parlante told you he wanted Lesniewski to know that
25 right away so Lesniewski would understand what he needed to do,

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1 and Lesniewski immediately complied. Lesniewski had him come
2 back for a series of pointless visits, billing Parlante's
3 insurance every time.

4 Parlante wasn't acting like he was in pain. He wasn't
5 asking for treatment. But Lesniewski kept directing him to
6 come back until the day Parlante asked Can I have a narrative
7 now?

8 Parlante didn't even bother to pretend like he
9 couldn't do his job anymore, and Lesniewski didn't even bother
10 to ask. Lesniewski just gave him a narrative for \$500 cash.

11 On top of that, when Parlante actually injured himself
12 in a minor accident on his last day of work, October 31, and
13 saw Lesniewski and complained of actual back pain, Lesniewski
14 spun that visit into part of the fraud by lying about it in
15 Parlante's disability narrative.

16 Let's take a look at it and at Lesniewski's own notes
17 which show that he lied.

18 This is Christopher Parlante's narrative. You can see
19 at the top it's dated November 24, 2004. This is Lesniewski's
20 narrative.

21 Now, if we go down to the bottom, the sentence begins
22 "apparently."

23 It says, "Apparently on November 1 Parlante was
24 sideswiped by a train." The narrative goes on to talk about
25 his back and how bad his back is.

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Summation - Ms. Friedlander

1 Can we go on to the next page. Just that top
2 paragraph.

3 He continues talking about his back and how bad his
4 back is and he ends by saying that Parlante was "placed on
5 steroids and has not been seen since," not been seen since he
6 had a bad accident and came in on November 1, 2004.

7 Can we see Lesniewski's records which show that this
8 is a lie.

9 Really? He hasn't seen him since November 1? You
10 know what Lesniewski neglected to mention?

11 Look at the handwritten notes, ladies and gentlemen.
12 The day before Lesniewski wrote his narrative, on November 23,
13 2004, Lesniewski saw Parlante again for another appointment.

14 And what did Parlante say? Parlante said his back was
15 feeling better.

16 Can you highlight the date?

17 It is right there. But Lesniewski pretended in the
18 narrative that that visit never happened. Why did he lie?
19 Because he was getting paid to make people look disabled on
20 paper. He was not getting paid to report the truth.

21 Of course, that brings us to Gary Supper, a stunning
22 example of a patient being open with Lesniewski about how they
23 were faking disabilities together.

24 Like all the other witnesses, Supper testified that he
25 saw Lesniewski for over a year to create a paper trail and that

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Summation - Ms. Friedlander

1 he kept coming back at Lesniewski's direction, getting billed
2 by Lesniewski every time for pointless visits that he paid for
3 through his United Healthcare insurance.

4 Supper told you his paper trail related to a shoulder
5 complaint. But around Thanksgiving of 2006, right before he
6 planned to apply for disability and just after his wife passed
7 away, Mr. Supper decided his paper trail might not look good
8 enough.

9 He instructed Lesniewski in writing to create more
10 fake disabling conditions and to do it fast, since Supper's
11 retirement date was right around the corner.

12 Let's look at Supper's instructions again. Here
13 Supper tells Dr. Lesniewski he wants permanent disability.

14 He writes, "Please do test."

15 he wants to get permanent disability.

16 "Please do test for back, knees, ankle. MRI, EMG, NVC
17 test."

18 He writes, "Please document symptoms why I cannot
19 perform my duties. I need something wrong. I need something
20 wrong besides shoulder. Once I get shoulder fixed, Railroad
21 Retirement may withdraw disability benefits.

22 "I need tests, MRIs, EMGs by December 10 or ASAP."

23 This is Supper telling Lesniewski in writing that he
24 wants Lesniewski to concoct fake disabling conditions so Supper
25 can get disability.

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Summation - Ms. Friedlander

1 You saw this note when Mr. Supper testified. You saw
2 it during the testimony of the government's expert, Dr. Barron.

3 It is one of the most devastating pieces of evidence
4 in this case. Let's talk about what it shows you.

5 First, it shows that Supper knew he was faking medical
6 conditions to get disability money.

7 Second, it shows you that Supper knew that Lesniewski
8 was helping him to fake medical conditions for disability; that
9 they were working together to commit this crime.

10 Think about it. If they were not involved in fraud
11 together, if Lesniewski were a legitimate doctor, it would be
12 crazy to write this note.

13 Remember what Dr. Barron said about this note? Dr.
14 Barron told you that as a physician this was the most upsetting
15 document that he saw during his entire review of Lesniewski's
16 records.

17 Dr. Baran told you if he got a note like this from a
18 patient he would call his patient into his office and close the
19 door.

20 MR. DURKIN: Objection. I think that was stricken.

21 THE COURT: Overruled.

22 MS. FRIEDLANDER: And he would say to his patient,
23 What are you thinking? This is totally inappropriate.

24 Dr. Barron's response was the common sense response of
25 an honest physician to a patient's invitation to commit fraud.

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Summation - Ms. Friedlander

1 But what was Dr. Lesniewski's response?

2 Dr. Lesniewski accepted the invitation to commit fraud
3 because he had been doing that for a long time.

4 How do you know that Lesniewski simply complied with
5 Supper's instructions? Well, Dr. Barron told you how. Dr.
6 Barron told you he saw in the records that suddenly, out of
7 nowhere, Lesniewski started documenting back and knee symptoms
8 around Thanksgiving. You can see that in the chart that we
9 introduced of Dr. Barron's opinions related to Mr. Supper.

10 You know Thanksgiving is right after Dr. Lesniewski
11 got Supper's note. You know that documenting symptoms like
12 that is just what Supper asked Lesniewski to do.

13 Suddenly Lesniewski wrote that Supper was suffering
14 from back pain and knee pain, and Supper had never complained
15 of back pain in over a year of visits, and he hadn't mentioned
16 any knee pain for months and months.

17 How else did Lesniewski follow Supper's instructions?

18 Well, just as Supper asked him to do, to make the
19 paper trail look even better, Lesniewski ordered back-to-back
20 MRIs that were completely unnecessary. Let's see the dates
21 that the MRIs were done.

22 This is the MRI of the spine on the left, early
23 December 2006; the MRI of the knee on the right, it is hard for
24 me to see from here, but it's approximately the same date.

25 On top of that, just as Mr. Supper asked him to do,

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Summation - Ms. Friedlander

1 Lesniewski invented these phony disabling conditions right on
2 time before December 10, just as Supper had asked.

3 Let's see his narrative.

4 This is Dr. Lesniewski's disability narrative for Gary
5 Supper, November 28, 2006, right on time, claiming that Supper
6 had disabling conditions in his back, in his knees, just as
7 Supper had asked him to do.

8 Can we show page 2 where the diagnoses are at the
9 bottom.

10 You can see diagnoses 3 and 4:

11 "Osteoarthropathy of the lumbar spine.

12 "Tear of the medial meniscus, left knee."

13 That is exactly what Supper told him to do.

14 For the sake of it, since Supper had asked him for a
15 third phony condition, if you remember the note, Lesniewski
16 threw in a fake diagnosis of bilateral basilar thumb joint
17 arthropathy.

18 He just threw that in. You can see that from Dr.
19 Barron's chart which is in evidence. No complaints for months
20 about any hand problem, any thumb problem. It just appears out
21 of nowhere.

22 Supper's instructions are devastating proof of
23 Lesniewski's guilt. It is not just what Lesniewski's patients
24 said to him. Look what he said to them.

25 Remember Steven Gagliano, the guy on disability who

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Summation - Ms. Friedlander

1 biked the 400-mile bike race. Gagliano told you he started
2 seeing Lesniewski about a year before he retired. He kept
3 coming back again and again, at Lesniewski's direction, in
4 order to create a paper trail. But it was Lesniewski who
5 suddenly, out of the blue, offered up a disability narrative.

6 One day, after a year of pointless visits, Lesniewski
7 turned to Gagliano and said, You have enough.

8 Enough? Enough for what?

9 What's he saying with those three words?

10 Lesniewski is saying, You have enough of a paper trail
11 to make it look like you're disabled. That is the doctor
12 talking. It is outrageous.

13 Lesniewski gave Gagliano the narrative and Gagliano
14 gave him \$850 cash. When Dr. Lesniewski said, You have enough,
15 Gagliano knew exactly what he was talking about, and you know
16 exactly what he was talking about. Lesniewski was talking
17 about tricking the government into giving Gagliano disability
18 in exchange for cash.

19 How else do you know that Lesniewski knew exactly what
20 he was doing when he supported these bogus disability claims?
21 He made up diagnoses. He made them up out of thin air.

22 Remember Dr. Baran told you how a legitimate physician
23 goes about diagnosing a patient. He told you that: First the
24 doctor listens to the patient's complaints; second, the doctor
25 does a physical exam of the body part that the patient is

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Summation - Ms. Friedlander

1 complaining about; and, third, the doctor does any ancillary
2 tests, like MRIs or x-rays, that might be needed.

3 Dr. Barron told you that a legitimate physician
4 matches those three things, correlates them, patient's
5 complaints, the physical findings from the exam, and the tests.
6 That's how a doctor arrives at a diagnosis.

7 But Dr. Barron also told you based on his review
8 that's not at all what Dr. Lesniewski did.

9 Lesniewski corrupted every step of the process to
10 further his crime. To begin with, you learned from Dr. Barron
11 that Lesniewski invented supposedly disabling conditions where
12 patients had never complained about any symptoms associated
13 with those conditions.

14 Remember how Lesniewski said that Chris Parlante had
15 carpal tunnel syndrome in his narrative, but had never said
16 that anywhere in his records or to Parlante?

17 Lesniewski wrote in his narrative that he had been
18 treating Parlante for over a year for carpal tunnel syndrome
19 that Lesniewski claimed was ongoing and permanent and disabled
20 Parlante from working at the Long Island Rail Road.

21 Can we just see the reference to carpal tunnel
22 syndrome in the narrative, because this is the only reference
23 to carpal tunnel syndrome that exists anywhere in Lesniewski's
24 records.

25 There it is, diagnosis 4. Parlante told you that the

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Summation - Ms. Friedlander

1 first time that he learned that Lesniewski had supposedly
2 diagnosed carpal tunnel syndrome was after his arrest in this
3 case.

4 He told you how shocked he was to see that Lesniewski
5 had written this. Other than complaining of a little arthritis
6 in his hand, he had never complained about anything involving
7 his hands. Parlante told you he knows what carpal tunnel
8 syndrome involves because his wife suffers from it and that
9 Lesniewski never said a word to him about carpal tunnel
10 syndrome or treatment for it.

11 What Mr. Parlante told you was corroborated by Dr.
12 Barron. Dr. Barron told you that a main symptom of carpal
13 tunnel syndrome is numbness and tingling in the hands. Dr.
14 Barron told you he didn't see a shred of evidence that Parlante
15 made any complaint consistent with carpal tunnel syndrome, that
16 Lesniewski never made a single finding or performed any
17 diagnostic test consistent with carpal tunnel syndrome, that
18 Lesniewski never treated any carpal tunnel syndrome.
19 Lesniewski just invented his carpal tunnel diagnosis on a
20 document submitted to the federal government because he thought
21 it would sound good.

22 And there's more.

23 As you know now from Dr. Barron, Lesniewski diagnosed
24 supposedly disabling cervical osteoarthritis in Joe Rutigliano
25 based on nothing but an obviously fake complaint of neck pain

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Summation - Ms. Friedlander

1 made by Rutigliano.

2 Do you remember this one?

3 Rutigliano came in one day, made one complaint about
4 his neck hurting. What did Dr. Lesniewski do? That day he
5 made up a diagnosis, cervical osteoarthritis, and he gave him
6 the disability narrative. He gave him the disability narrative
7 the very day that Rutigliano first complained of neck pain.

8 He gave him a disability narrative claiming that
9 Rutigliano's so-called cervical osteoarthritis was a permanent
10 basis for disability. As you know from Dr. Barron, Lesniewski
11 didn't even examine him. Lesniewski didn't order any tests.
12 He did nothing.

13 What makes this even more absurd, you heard from Dr.
14 Barron that Rutigliano's complaint was anatomically impossible.

15 Let's see this in Lesniewski's records. This is
16 100-E.

17 You can just highlight -- that's great.

18 Do you see the date? September 28, 1999.

19 Can we highlight the complaint about the cervical
20 spine.

21 "Patient woke up with pain in neck for about one week
22 now. It radiates down to his lower back."

23 Dr. Barron told you that that is an anatomically
24 impossible complaint because the nerves in the neck are not
25 connected to the nerves in the lower back. You cannot have

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Summation - Ms. Friedlander

1 pain that radiates from your neck to your lower back.

2 What does that fake complaint tell you besides that
3 Lesniewski's diagnosis is totally bogus. It tells you
4 Rutigliano was lying and that Dr. Lesniewski, an orthopedic
5 surgeon, knew that Rutigliano was lying.

6 But Lesniewski didn't care. He cooked up a phony
7 disability based on the complaint because that's what he was
8 paid to do.

9 We have discussed how Lesniewski diagnosed conditions
10 where the patients' complaints didn't match them. Now let's
11 talk about how he corrupted the process of making physical
12 findings in an exam in order to commit this crime.

13 Dr. Barron told you that making physical findings in
14 an exam is the most important step that a legitimate doctor
15 takes in diagnosing a patient.

16 But Lesniewski didn't do what legitimate doctors do.

17 As Dr. Barron told you, Lesniewski didn't examine his
18 patients to make the necessary findings, and sometimes the few
19 findings he bothered to make flew in the face of the diagnoses
20 he was making.

21 We have already talked about Rutigliano's bogus neck
22 condition. Do you remember Lesniewski's finding that Gagliano
23 had full range of motion in his wrist? Dr. Barron told you
24 that proves Gagliano had no meaningful tear in his wrist as
25 Lesniewski claimed.

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Dr. Barron also told you that Lesniewski's sole findings related to Christopher Parlante's hands, a finding that Parlante had no numbness or tingling, flies in the face of Lesniewski's claim that he believed Parlante had disabling carpal tunnel syndrome.

On top of that, Dr. Barron also told you how Lesniewski corrupted the final step doctors take in the process of diagnosing patients, getting ancillary tests like MRIs and x-rays.

Dr. Barron told you how Lesniewski completely misused the tools of the medical profession to support his phony diagnoses. He told you that Lesniewski's tests showed totally normal age-related changes that most middle aged people have; changes like disc bulges, disk herniations, small meniscal tears and bone spurs.

Dr. Barron told you that these are typical changes that occur in the body as we age and that for most people those changes will never cause any pain or symptoms.

Dr. Barron explained those middle-aged people like all of Lesniewski's Long Island Rail Road patients in this case will have those findings, these age-related changes. They will have them show up in their MRIs, but those findings will be meaningless. But Lesniewski twisted that fact to his advantage in this fraud.

Dr. Barron explained to you how Lesniewski misused the

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Summation - Ms. Friedlander

1 findings from his MRIs and x-rays, grossly overstating them to
2 make it sound like they were the cause of permanent disabling
3 conditions when that was completely false.

4 Dr. Barron told you, as an orthopedic surgeon looking
5 at Gagliano's MRI report, that not only did the findings fail
6 to suggest a disabling back problem, as Lesniewski claimed.
7 They were better than average findings.

8 Of course, Lesniewski knew that. He knew Gagliano's
9 MRI report showed normal age-related changes that weren't
10 causing Gagliano any symptoms.

11 But instead he pretended that those findings were
12 evidence of a disabling back problem because he was getting
13 paid to lie.

14 How else did Lesniewski misuse the tools of the
15 medical profession for his fraud?

16 Well, as Dr. Barron told you, not only did Lesniewski
17 overstate the findings in MRIs and other tests, but he
18 sometimes claimed people had disabling conditions when the
19 tests showed they didn't have any problems at all.

20 Dr. Barron told you, for example, that the report of
21 Rutigliano's knee MRI shows plainly that Rutigliano had no
22 arthritis in his knee whatsoever. But Lesniewski provided a
23 disability narrative claiming that Rutigliano suffered ongoing
24 and permanent knee arthritis.

25 What is yet another way that you can tell Lesniewski

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Summation - Ms. Friedlander

1 knew exactly what he was doing when he supported these phony
2 disability claims?

3 He didn't provide any treatment to these people.
4 Dr. Barron told you that even if all these patients had all of
5 these conditions, which they didn't, they are common and easily
6 treatable conditions. He told you they are treatable with
7 injections, for example, and that he gives dozens of those
8 every week to patients who feel better immediately.

9 Dr. Barron said if injections didn't work for some
10 reason, although they usually do, most of the conditions are
11 curable with a short outpatient procedure, not major surgeries,
12 but procedures under local anesthetic where the patients walks
13 in and out of the office.

14 Is that what Lesniewski did to treat the LIRR
15 patients? Nope, because he wasn't getting paid to treat them.
16 He was getting paid to make them look disabled on paper.

17 You heard about Lesniewski's lack of treatment from
18 witness after witness, including Parlante, Ellensohn, Gagliano
19 and Supper.

20 Lesniewski directed these witnesses to keep coming
21 back for visits every couple months for over a year. And what
22 was the entire extent of the treatment that this physician,
23 this orthopedic surgeon gave them? For the most part nothing
24 but anti-inflammatories, medication like Advil, Vioxx,
25 Celebrex. Gus Baran, Parlante, Gagliano and Ellensohn got

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Summation - Ms. Friedlander

1 nothing but anti-inflammatories from Dr. Lesniewski for over a
2 year of visits for conditions that they and Lesniewski claimed
3 to paper were completely disabling to them.

4 Rutigliano and Supper got hardly more than that, and
5 Rutigliano didn't get any treatment at all for his supposedly
6 disabling neck condition. That is ridiculous. And it shows
7 you what a fraud Lesniewski and his patients were committing
8 together.

9 Why?

10 Well, it shows you first that any pain these people
11 actually had was minor. They came back and forth to
12 Dr. Lesniewski for over a year with generally nothing but
13 anti-inflammatories, and they didn't ask for anything more,
14 because they didn't need anything more.

15 It also shows you that Lesniewski didn't think there
16 was anything seriously wrong with them, even though he wrote
17 that after seeing them for over a year he concluded that they
18 had disabling conditions.

19 Lesniewski's lack of treatment is another powerful
20 reason that you know Lesniewski knew his job wasn't to try to
21 make people feel better, but just to create the false
22 appearance that they were disabled.

23 The defense wants you to think that because Lesniewski
24 asked some Long Island Rail Road workers if they wanted surgery
25 for some condition or another that somehow that means

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Summation - Ms. Friedlander

1 Lesniewski was really trying to treat them. That is ludicrous,
2 as the LIRR witnesses explained, as Dr. Barron explained, and
3 as your common sense tells you.

4 Lesniewski knew and they knew these little mentions of
5 surgery were a joke for many reasons:

6 First, there was very little wrong with them.

7 Second, they wanted him to say they were disabled, not
8 cured. They didn't want surgery. He knew that.

9 And, third, they weren't asking him for any treatment
10 at all, much less surgery.

11 So, of course, they said no in these little
12 conversations for all those reasons, as he knew they would.

13 So why have the discussion? Because Lesniewski's not
14 stupid. He knows he's not providing them any treatment. He
15 knows anti-inflammatories are a complete joke for a year's
16 worth of treatment by an orthopedic surgeon. This is just part
17 of his charade to make it look like the conditions are serious
18 and require surgery and that there's nothing else he can do.

19 Dr. Barron as a legitimate orthopedic surgeon, told
20 you that these surgery notes, "make no sense to me whatsoever"
21 because there are many forms of easy treatment that fix these
22 problems completely when people really have these problems.

23 But Lesniewski didn't offer those kind of treatments.
24 Instead, Lesniewski simply made a quick comment about surgery
25 or wrote that surgery was inevitable.

D7vnles3

Summation – Ms. Friedlander

1 Dr. Barron said those notes were remarkable to him.

2 He said they made no sense to him, because he is an honest

3 doctor. The notes make perfect sense if you see that

4 Lesniewski wasn't trying to treat anyone and was only trying to
5 create a paper trail of lies for cash.

If you want a great example of how Lesniewski knew
fully well that he was giving no meaningful treatment to these
people and that his notes about surgery are a complete joke,
look no further than what Robert Ellensohn told you.

10 As you will recall, while Ellensohn was seeing
11 Lesniewski to create a paper trail for disability, Lesniewski
12 gave him no treatment other than anti-inflammatories for his
13 supposedly serious shoulder condition, nothing else at any time
14 in all the visits.

15 To make it look like the condition was as serious as
16 he claimed on paper, Lesniewski wrote that Ellensohn needed
17 surgery. But after getting disability, years later Ellensohn
18 actually got real pain in his shoulder, and he went to
19 Lesniewski.

20 What did he tell you Lesniewski did then?

21 What did Lesniewski do when he knew that Ellensohn
22 wasn't coming to him just to create a paper trail for
23 disability?

24 Did Lesniewski give him anti-inflammatories and tell
25 him to keep coming back every two months for a year? No.

D7vnles3

Summation - Ms. Friedlander

1 Did he write in his notes, Oh, there's nothing we can
2 do, surgery is inevitable, just like he did when they were
3 doing this disability scam together?

4 Nope.

5 This time, after Ellensohn was on disability, when
6 Ellensohn complained about his shoulder, Lesniewski gave him an
7 injection.

8 Ellensohn was cured as he told you. He was cured. He
9 didn't go back and Lesniewski didn't ask him to. That shows
10 you show clearly that Lesniewski knows what real treatment is.
11 He knows when it's necessary to give it, and he is perfectly
12 capable of treating these minor conditions when he's not
13 getting paid to lie.

14 We talked about the fact that Lesniewski and his LIRR
15 patients made clear that Lesniewski's job was just to get them
16 disability.

17 We have talked about the fact that Lesniewski made up
18 phony diagnoses again and again and how he misused the tools of
19 his profession to do that.

20 We've talked about the fact that Lesniewski provided
21 no meaningful treatment to these LIRR employees and that they
22 didn't ask for any.

23 How else do you know that Lesniewski knew exactly what
24 he was doing when he supported these bogus disability
25 applications? He confessed.

D7vn1es3

Summation – Ms. Friedlander

Lesniewski admitted to agents that he exaggerated the LIRR employees' medical conditions on disability forms submitted to the federal government.

That is another way of saying that Lesniewski admitted to lying to get these people disability benefits.

MR. DURKIN: Objection.

THE COURT: Overruled.

MS. FRIEDLANDER: Lesniewski admitted that he was exaggerating when he said these people could not do heavy lifting, could not bend, could not kneel, could not stand, could not walk, could not sit. He admitted he did that on all the forms.

On top of that, Lesniewski admitted that he knew the LIRR patients were lying, too.

In his words, the LIRR employees had "too much secondary gain not to exaggerate their symptoms."

Remember Dr. Barron talked to you about secondary gain. Secondary gain is when a patient stands to gain something or profit in some way from a doctor's diagnosis, such as by getting money like disability benefits.

Lesniewski admitted he knew that these LIRR patients were exaggerating their symptoms because they wanted disability benefits. On top of that, he admitted that he further exaggerated their symptoms in the documents he submitted to the government.

D7vnles3

Summation – Ms. Friedlander

Lesniewski also admitted that he bolstered these applications with MRI reports where he had made minimal findings that would suggest anything was wrong with these people.

Again, that is exactly what Dr. Barron told you that he observed in the records. Dr. Barron said in his opinion, Lesniewski frequently based his diagnoses on MRIs that he claimed showed serious problems when in fact the findings were completely normal.

Why did Lesniewski do it? Why did he lie?

Lesniewski admitted that he lied because he knew the LIRR employees were seeing him to get disability. He admitted he was getting paid \$850 to \$1,000 per disability narrative that he provided.

We will talk more later about the specific crimes that Dr. Lesniewski is charged with, basically fraud and conspiracy to commit fraud, but Lesniewski's confession amounts to an admission --

MR. DURKIN: Objection.

MS. FRIEDLANDER: -- an admission of guilt of the crimes that he is charged with.

MR. DURKIN: Objection. It's not a confession.

THE COURT: Sustained.

MS. FRIEDLANDER: It comes on top of the mountain of other evidence of his guilt that we have already talked about.

D7vnles3

Summation - Ms. Friedlander

1 You heard a suggestion from Mr. Dratel in his opening
2 statement that Lesniewski didn't earn a lot of money from doing
3 this. Ladies and gentlemen, that's why you rely on the
4 evidence and not the statements of lawyers.

5 Lesniewski admitted to making \$850 to \$1,000 for each
6 narrative he provided. On top of that, you heard evidence that
7 Lesniewski made an additional \$286,000 through insurance
8 payments for visits by LIRR employees from 2003 to 2008 alone.
9 That is just a piece of the time he was committing this fraud.
10 In what universe is that not a lot of money?

11 You know it was a lot of money to Dr. Lesniewski
12 because you have his tax returns which show his income every
13 year.

14 Let me use 2005 as an example. I think it's 24.

15 This is a chart showing the insurance reimbursements
16 to Dr. Lesniewski for LIRR patients just for the years 2003 to
17 2008.

18 As you can see here, based on the United Healthcare
19 records, in 2005 Lesniewski made just over \$50,000 by charging
20 United Healthcare for visits by Long Island Rail Road
21 employees.

22 That is just the insurance payments. On top of the
23 \$50,000, he was making thousands and thousands and thousands of
24 dollars in cash for disability narratives.

25 How much money is that to Lesniewski? Well you saw

D7vnles3

Summation - Ms. Friedlander

1 his 2005 personal income tax return. It showed that his total
2 income that year was \$166,000. I won't put it up on the
3 screen, but it's Government Exhibit 1501.

4 Ladies and gentlemen, that means in 2005 alone a huge
5 amount of Lesniewski's income came from this fraud. The
6 defense may try to make some ridiculous argument about the
7 volume of Lesniewski's business to try to distract you from the
8 point that Lesniewski made a lot of money from this fraud and
9 that he got a large amount of his income every year from this
10 fraud.

11 They showed you just before I began speaking a chart
12 of the gross receipts of Lesniewski's business so that you
13 couldn't focus on Lesniewski's actual income.

14 MR. DURKIN: Objection.

15 THE COURT: Sustained.

16 MS. FRIEDLANDER: Please look at Lesniewski's business
17 tax returns as well, because what you will see is that
18 Lesniewski could barely turn a profit in any year. In some
19 years his business was losing money.

20 It is yet another way of showing how important this
21 money was to Lesniewski and what a tremendous motive it gave
22 him to commit fraud.

23 Ladies and gentlemen, you have the testimony of four
24 separate Long Island Rail Road employees that Lesniewski was
25 paid to create a phony paper trail for disability and that his

D7vnles3

Summation - Ms. Friedlander

1 documents are filled with lies.

2 You have Lesniewski's records corroborating what they
3 told you, records showing a bunch of pointless visits and no
4 meaningful treatment. You have the testimony of an expert that
5 Lesniewski didn't diagnose these people the way honest doctors
6 do, that he made no real effort to treat these people.

7 You also have evidence of Lesniewski's powerful
8 motive, his huge profit, and you have all of the admissions
9 that he made.

10 The evidence is overwhelming that Lesniewski knew this
11 was a fraud, he helped people commit it because he was making
12 money a lot of money that way.

13 Now let's go to Marie Baran and Joseph Rutigliano, the
14 disability consultants, who according to counsel had been
15 running perfectly legitimate businesses.

16 First of all, before getting into all the evidence of
17 their fraud, the very idea that you need to hire someone to
18 fill out a form that asks basic questions about your own life
19 is absurd. It should set off alarm bells in your head.

20 In what legitimate world would you pay a thousand
21 dollars cash to a stranger to fill out a form that asks basic
22 questions about your own life, questions like whether you can
23 sit, stand, dress yourself or bathe yourself?

24 Of course, you don't need to rely on guesswork in this
25 case because the proof is overwhelming that Baran and

D7vnles3

Summation - Ms. Friedlander

1 Rutigliano knew exactly what they were getting paid for and
2 what they had to do to get so much money.

3 Baran and Rutigliano knew they had to fill the
4 employees' disability applications with lies, the sort of lies
5 that would trick the RRB into thinking that the employees were
6 disabled when they were not.

7 Let's look at Marie Baran first.

8 Marie Baran knew all about the RRB because she worked
9 there for many years.

10 She knew the disability process, and she knew what
11 lies worked to help get people disability benefits.

12 Besides the fact that she worked there for so long,
13 how else did she know what lies would work?

14 Because she looked at her husband. She saw how he was
15 able to swindle the government by faking a disability.

16 As you know Gus Baran worked for the Long Island Rail
17 Road until 2003. Like everyone else, Gus Baran started seeing
18 one of the three disability doctors over a year before he
19 wanted to retire.

20 As you know, Gus Baran saw Lesniewski for a series of
21 pointless visits in which Lesniewski gave him no treatment at
22 any time except anti-inflammatories and no treatment ever for
23 the foot problem that he claimed to have.

24 Of course, all the time Gus Baran was seeing
25 Lesniewski while getting no treatment, Gus Baran was working,

D7vnles3

Summation - Ms. Friedlander

1 and not just working full-time, but working overtime like so
2 many people you heard from who participated in this fraud. You
3 saw Gus Baran's overtime records in the case. They are in
4 evidence. He worked over 1300 hours of overtime in his last
5 year leading up to the time he suddenly claimed to be disabled.

6 Marie Baran on the stand tried to suggest Gus Baran is
7 really disabled because he didn't volunteer for all of the 1300
8 hours of overtime that he worked. He only volunteered for part
9 of the 1300 extra hours. It was ridiculous testimony.

10 Gus Baran was not struggling to do his job. He was
11 doing his job and then some.

12 Gus Baran and Lesniewski filled Baran's disability
13 application materials with lies. Lesniewski said Gus Baran was
14 medically restricted from sitting, bending, or driving because
15 of his supposedly disabling spinal stenosis.

16 Dr. Barron showed you that in the records that
17 Lesniewski completed for the RRB. I won't put them up, but
18 it's Government Exhibit 113-B. Gus Baran told the same lies in
19 his disability application claiming that his back problem, his
20 disabling spinal stenosis made it hard for him to sit or drive.

21 Can we see his application.

22 There is his name, Ostap Baran, he goes by Gus. Can
23 we see section 6.

24 Mr. Baran says it's hard for him to sit, it's hard for
25 him to drive. He says he's completely incapable of performing

D7vnles3

Summation - Ms. Friedlander

1 any outdoor chores at all.

2 How do you know these are lies? Well, Dr. Barron told
3 you that many people with spinal stenosis have no symptoms, but
4 when they do have symptoms the one thing that makes them feel
5 better is sitting down. They feel better when they sit or
6 bend.

7 Gus Baran and Dr. Lesniewski lied when they said
8 Baran's spinal stenosis made it hard for him to sit or bend,
9 and Marie Baran repeated that same lie on the stand.

10 Of course, Gus Baran didn't get just occupational
11 disability with these lies. He was declared totally and
12 permanently disabled.

13 As a result, he not only got a disability pension he
14 didn't deserve. He got early Medicare, all of it paid for by
15 Social Security and the U.S. Railroad Retirement Board.

16 Remember how Mr. Jackson said to you in opening this
17 is a case about occupational disability. This isn't a case
18 about total and permanent disability. Remember how he said
19 total and permanent disability, that's for people who use canes
20 that's for people in wheelchairs.

21 MR. JACKSON: Judge, I am going to object. I think
22 she mischaracterized what I said.

23 THE COURT: Sustained.

24 MR. JACKSON: Thank you.

25 MS. FRIEDLANDER: Ladies and gentlemen, as you now

D7vnles3

Summation - Ms. Friedlander

1 know, this is case about permanent disability, because Gus
2 Baran and Joe Rutigliano are both on total and permanent
3 disability.

4 Are they in wheelchairs? No.

5 So what does Gus Baran do? How have the Barans been
6 spending the government's money that is meant to be a safety
7 net for seriously sick and injured people?

8 (Continued on next page)

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D7VLLES4

Summation - Ms. Friedlander

1 MS. FRIEDLANDER: First, they have been using Gus
2 Baran's total and permanent disability benefits to fund
3 expensive vacations together all over the world, traveling
4 around Europe, the Middle East, and the Caribbean, all on
5 government's dime.

6 Gus Baran said it was hard for him to sit, stand, walk
7 or bend, but since getting total and permanent disability, the
8 Barans have traveled to Italy, Egypt, Spain, Germany, Western
9 Canada, Ireland, Scotland, Mexico, and the Dominican Republic,
10 again and again to the Dominican Republic, all funded by a fat
11 disability pension that the government was defrauded into
12 paying. The Barans have been wintering in Florida and
13 summering in New York.

14 MR. DURKIN: Your Honor, excuse me, but we'll have a
15 motion later on.

16 MS. FRIEDLANDER: So Gus Baran can enjoy 18-hole golf
17 year-round, all while he claims to be totally and permanently
18 disabled.

19 Mr. Jackson suggested to the government's expert,
20 Dr. Barron, who you know is not related to Marie and Gus
21 Baran -- they spell their names differently -- Mr. Jackson
22 suggested, well, Gus Baran may be able to sit in a golf cart,
23 but he couldn't just sit in a golf cart while doing his job.
24 So what?

25 MR. JACKSON: Judge, can we make about this about the

D7VLLES4

Summation - Ms. Friedlander

1 facts of the case as opposed to what defense lawyers suggest?

2 THE COURT: Overruled. Overruled.

3 MR. JACKSON: OK. I'll make some suggestions later.

4 THE COURT: Proceed.

5 MS. FRIEDLANDER: Gus Baran claimed in his disability
6 application that it was hard for him to sit, period. So if
7 it's easy for him to sit in a golf cart, he lied on his
8 disability application.

9 Mr. Jackson also said to Dr. Barron, well, did you
10 ever consider that maybe people get better? But that's equally
11 absurd because the Barans have never told the RRB that Gus
12 Baran got better. You know that Gus Baran signed his
13 disability application which says you have to immediately
14 notify the government if your condition improves and, of
15 course, Marie Baran knows that because she's a disability
16 expert. They've never said Gus Baran got better.

17 Marie Baran said on the stand yesterday that he's
18 totally and permanently disabled, and as you now know, Gus
19 Baran is collecting total and permanent disability benefits to
20 this day.

21 They say that a picture is worth a thousand words. So
22 rather than me describing what Gus Baran has been up to since
23 he became supposedly totally and permanently disabled, let's
24 see it. As you know, Gus Baran was caught on videotape
25 enjoying multiple days of 18-hole golf this spring, all while

D7VLLES4

Summation - Ms. Friedlander

1 collecting total and permanent disability benefits.

2 And before we play the video, just remember that to
3 get disability, Gus Baran claimed that it was impossible for
4 him to do any outdoor chores and hard for him to sit, stand,
5 walk, drive, and bend to tie his shoes because of his
6 supposedly disabling spinal stenosis. Now let's watch the
7 video where you will see him easily do all those things.

8 (Video recording played)

9 MS. FRIEDLANDER: Here he is beside his car because
10 despite claiming that it's hard for him to drive, Gus Baran
11 drove himself to the golf course. There he is bending easy to
12 tie his shoes.

13 MR. JACKSON: Judge, can we blow it up so it's full
14 screen?

15 MS. FRIEDLANDER: Can most people bend this easily?

16 THE COURT: Is it possible to blow up?

17 MS. FRIEDLANDER: I think that's the best we can do,
18 Judge.

19 Can we see the next clip. In the next clip you will
20 see him easily standing, twisting, stretching, taking practice
21 swings, just swinging his golf club pointlessly around.

22 (Video recording played)

23 MS. FRIEDLANDER: That's not hard for him. He's not
24 suffering through that as Ms. Baran claimed so ridiculously on
25 the stand.

D7VLLES4

Summation - Ms. Friedlander

1 Of course, the fact that Gus Baran's application is
2 filled with lies about his back condition is shown not just
3 through the video, but through the testimony of Dr. Barron, who
4 told you that if Gus Baran can play golf, he does not have
5 significant spinal stenosis.

6 Ladies and gentlemen, those videos of Gus Baran show
7 an average, middle-aged man with no serious physical problems
8 enjoying a sunny day on the golf course. It would all look
9 completely normal if you didn't know that when he parked his
10 car, Gus Baran parked in a handicapped spot, as Special Agent
11 Tumulty told you, because Baran has a handicap parking permit.
12 It would all look normal if you didn't know that Gus Baran was
13 at the golf course in the middle of the week, as you heard,
14 because Gus Baran doesn't have to work for a living because his
15 life of leisure is funded by his scam on the government.

16 In sum, ladies and gentlemen, and as Marie Baran, his
17 wife, has obviously always known, Gus Baran is not totally and
18 permanently disabled. He's just another Long Island Railroad
19 employee involved in this fraud.

20 What does Gus Baran's fraud mean as far as Marie Baran
21 is concerned? It means that she knew before she ever started
22 this disability consulting business that this was all a fraud.
23 Her own husband had been on total and permanent disability
24 since years before she started her business. She knows he's
25 not totally and permanently disabled. She knows what a fraud

D7VLLES4

Summation - Ms. Friedlander

1 this is. And after living off her husband's fraud for years,
2 Marie Baran decided to go into the fraud business full-time,
3 helping other Long Island Railroad employees commit the same
4 fraud her husband committed.

5 Marie Baran created disability applications filled
6 with lies in exchange for cash. How do you know Marie Baran
7 was lying? Well, to begin with, you've heard from multiple
8 witnesses, multiple people who told you they paid her cash to
9 complete their applications and who told you that she
10 completely lied.

11 Regina Walsh, Michael Stavola, and Robert Dunaj all
12 told you that they met with Baran, they told her when they
13 wanted to retire, they told her basically nothing about their
14 physical condition, and she never asked about it. And then she
15 filled their applications with sad stories about how they were
16 too disabled to carry out most of the normal activities of
17 daily living: sitting, standing, dressing themselves, bathing
18 themselves. Marie Baran didn't get those lies from the
19 applicants. She made them up herself.

20 Let's talk about what the witnesses told you. First,
21 Michael Stavola, a patient of Dr. Parisi, one of the three
22 disability doctors involved in this scheme, who offered Stavola
23 a disability narrative as soon as Stavola said he was retiring.
24 What did Stavola tell you? He told you he went to Marie Baran
25 so she could complete his disability application and she agreed

D7VLLES4

Summation - Ms. Friedlander

1 to do that. She said she knew Parisi. Stavola didn't tell her
2 anything about his physical condition. He said, at most, he
3 may have said the doctor found a herniated disk, but's not even
4 sure he said that. And that's it.

5 Stavola got a bogus narrative for an \$800 payment to
6 that corrupt Dr. Parisi, and that same day Stavola picked up
7 his completed disability application from Marie Baran in
8 exchange for \$1,000 cash. You can see in his calendar how he
9 got the whole fraud package just in one day. There it is. You
10 can see he scheduled visits to Parisi and Marie Baran
11 back-to-back to get his fraud materials.

12 Baran never asked Stavola anything about his physical
13 condition before completing that application. She never asked
14 him anything about his typical day. She never asked him
15 whether he could do his job. Why? Because Baran didn't care.
16 She wasn't trying to be truthful. She knew what she was going
17 to put in his disability application before she even met him
18 because it's the same garbage that she put in all these
19 applications.

20 Let's take a look at his application. Michael
21 Stavola -- can we go to Section 6. Here you go -- nearly
22 identical to so many other Marie Baran applications that you
23 have seen in this trial. Sitting, standing, walking, bathing,
24 dressing, performing other bodily needs, indoor chores,
25 driving, using public transaction -- all supposedly hard for

D7VLLES4

Summation - Ms. Friedlander

1 Michael Stavola.

2 Can we see question 40. Again, you have seen this so
3 many times in so many applications, you probably know it by
4 heart. I sleep very poorly because of neck pain and lower back
5 pain. I get up about 7 a.m. I have breakfast, shower, and
6 dress. I do some light exercise to stretch as prescribed by my
7 doctor. It goes on and on. You've seen this before.

8 Mr. Stavola told you these were all lies. He didn't say these
9 things to Ms. Baran. Of course, he wanted her to lie. He
10 wanted her to say whatever she needed to say to get him
11 disability.

12 He told you that he paid Baran \$1,000 cash to complete
13 the application, and he wasn't paying her to tell the truth.
14 He could tell the truth himself. You know how long it would
15 have taken Michael Stavola to complete that truthfully? It
16 wouldn't take him a minute to check the boxes saying that
17 sitting and standing and bathing himself and doing all those
18 other things listed there were easy for him to do.

19 And it didn't take him a minute to describe to you on
20 the witness stand how he really spent an average day. He told
21 you that while he was retired, before the government cut off
22 his disability benefits and he had to get a job, Stavola told
23 you he played golf several days a week, including with Baran's
24 husband while both of them were on disability. He told you he
25 spent other days riding a bike outside or at the gym. Telling

D7VLLES4

Summation - Ms. Friedlander

1 the truth wouldn't get him disability, so he paid Marie Baran a
2 thousand dollars to say whatever needed to be said to get it
3 for him. She got paid a huge amount of cash to fill the simple
4 application with lies.

5 How do you know that Michael Stavola is telling you
6 the truth when he says he never told Marie Baran any of the
7 nonsense in that application about his physical condition or
8 his average day and that Baran made it all up? Because you've
9 seen in this trial that his application was essentially a
10 duplicate of so many others, that she created just cookie
11 cutter bogus descriptions of a sad, physically limited life.

12 Let's take a look at Government Exhibit 17, which was
13 introduced during the testimony of the auditor Natasha Marx.
14 This is a compilation of the answers to question 40 on the
15 disability application -- please describe your normal day.
16 It's a compilation of the responses to that question taken from
17 applications of some of Baran's clients.

18 Just take a moment and compare Phillip Pulsonetti's
19 description of an average day in an application submitted on
20 June 23, 2008, compare that to the description of Michael
21 Stavola's average day submitted four days later. They are
22 identical. This list, Government Exhibit 17, goes on and on
23 and on. Every few days you will see Baran is submitting
24 identical descriptions for client after client after client.

25 She's doing this, of course, because these are the

D7VLLES4

Summation - Ms. Friedlander

1 lies that work. It's her tried and true method of fraud. Do
2 you think for a second that all of these people walked into
3 Marie Baran's office over time and described their normal day
4 and they just coincidentally all happened to live identical
5 days? Of course not.

6 Of course, it's not just Michael Stavola who you heard
7 from. You also heard from Robert Dunaj who told you, just as
8 Stavola did, that Baran didn't ask him all these questions
9 about his physical condition, didn't ask him if he could do his
10 job, didn't ask him about his average day, and he never told
11 her any of the things in his application.

12 On top of that, you heard from Regina Walsh, who
13 provided perhaps the most devastating evidence of Baran's fraud
14 that was presented in this entire trial. And before we discuss
15 her testimony, let me remind you of Regina Walsh's status in
16 this case.

17 As Walsh told you, she committed this fraud and she
18 has pleaded guilty and she has paid back to the government
19 every cent of the \$56,000 that she got in fraudulent disability
20 benefits. She is not a cooperating witness. Regina Walsh had
21 no obligation to testify in this trial. She has no agreement
22 with the government for the government to provide a letter to
23 the judge talking about her cooperation in this case.

24 You'll remember I asked her on the stand: Why are you
25 testifying today? And she said, quote, because I lied and I

D7VLLES4

Summation - Ms. Friedlander

1 know I lied and I'm trying make a right out of something I did
2 wrong. That's page 823 of the transcript. It is important to
3 remember that as we talk about Walsh's testimony. Ms. Walsh
4 got up on the stand and subjected herself to cross-examination,
5 and she did it because she's trying to make a right out of a
6 wrong.

7 So let's talk about her testimony. Ms. Walsh told you
8 that she was the director of employee services at the Long
9 Island Railroad. She worked in an office. She did not work on
10 train tracks. When Walsh got ready to retire, she started
11 seeing Dr. Ajemian, one of the three corrupt doctors involved
12 in this scheme. But she wasn't sure if she was really going to
13 go through with applying for disability because she knew it was
14 wrong.

15 One day, Walsh called Marie Baran, who was still
16 working at the RRB at the time, to ask her a question about her
17 federal retirement benefits. And what did Baran say? First
18 Baran answered her question and then, out of the blue,
19 unprompted, Baran said, oh, you going to file for disability?
20 Are you seeing Dr. Ajemian?

21 Baran's questions show you that she knew everyone at
22 the Long Island Railroad was applying for disability, that they
23 were planning their disabilities, and that they were seeing
24 corrupt doctors for a series of visits to paper a file.

25 There is no legitimate reason why Marie Baran on her

D7VLLES4

Summation - Ms. Friedlander

1 own would just assume that Walsh had become disabled and would
2 apply for disability. Walsh wasn't doing manual labor. She
3 wasn't wearing steel-tipped shoes, as Baran suggested that all
4 of these employees did. She worked in an office.

5 Of course, Dr. Ajemian did just what Baran did because
6 they are both totally corrupt. And when Walsh told him she was
7 retiring, he simply offered up a disability narrative out of
8 the blue, even though she never even discussed disability with
9 him before and never suggested she had any trouble doing her
10 job. Like Baran, Ajemian knew that people were retiring from
11 the Long Island Railroad just wanted disability and he charged
12 them accordingly.

13 Walsh paid him nearly \$2,000 cash for the narrative,
14 which she told you is filled with lies from Dr. Ajemian, and
15 then she went to Marie Baran's office for the application. And
16 what happened during that meeting? Walsh told you she
17 described her job to Marie Baran and then Baran, in front of
18 her eyes, typed an exaggerated description of that job into her
19 disability application.

20 Here it is, the disability application that Baran
21 created. Can we turn to Section 3, question 12. It says
22 sitting at a desk and using a computer caused consider -- I
23 think it needs to say considerable -- pain in neck, shoulder
24 and hands. Sitting or standing for any length of time caused
25 considerable pain in both legs.

D7VLLES4

Summation - Ms. Friedlander

1 It goes on to talk about how Walsh supposedly had to
2 walk long distances from facility to facility and how sitting
3 in -- she frequently had to drive and sitting in an automobile
4 for any length of time caused her great discomfort. Ms. Walsh
5 told you these are all lies, this is Marie Baran's language,
6 this is the exaggerated language that Regina Walsh watched
7 Marie Baran type into this application.

8 We can take a quick look at Section 6, please. Of
9 course, Section 6, you know what this is going to say before I
10 even say it to you. Everything is hard. Everything causes
11 pain. Walsh told you that Marie Baran filled this section with
12 lies.

13 Walsh told you that all she ever said to Marie Baran
14 about her physical condition was that she had a little bit of
15 pain when she sat for a long period of time. That's page 853
16 of the transcript. That is it. Walsh told you all of these
17 answers are completely false and she never discussed any of
18 this with Marie Baran and that Marie Baran just made it up.

19 Baran didn't stop there. From all her RRB experience,
20 Baran knew that Walsh would have trouble getting disability.
21 So what did she instruct Walsh to do? Keep seeing Dr. Ajemian.
22 Marie Baran, essentially a stranger, instructed Walsh to keep
23 visiting a physician. She told Walsh to continue seeing
24 Ajemian because if the RRB denied disability, Walsh could
25 appeal the decision and it would help her get disability on

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Summation - Ms. Friedlander

1 appeal if she had a record of continuing visits to a physician.

2 Ladies and gentlemen, that is a stunning demonstration
3 of Baran's knowledge that she was involved in a huge fraud.

4 Baran instructed Walsh to keep up the paper trail to try to
5 trick the RRB. And Walsh told you she did exactly what Baran
6 told her to do and kept seeing Ajemian even after she submitted
7 the application.

8 Still, Baran's fraud with Regina Walsh didn't stop.
9 You heard that Walsh didn't get disability right away. Baran
10 said she'd find out why and then see used her pull at the RRB
11 to find out behind the scenes that the RRB had questions about
12 what Walsh was doing in her day-to-day job and that the RRB was
13 planning to call Walsh to ask those questions.

14 Ms. Walsh told you Ms. Baran called her and said the
15 RRB is going to call you with questions and here are the exact
16 questions they are going to ask you and here are the exact
17 answers that you are going to give.

18 Walsh told you that she wrote down everything Baran
19 was saying as best she could. Why? Because what Baran was
20 saying about Regina Walsh's day-to-day job was a complete lie,
21 and because it was a lie, Walsh didn't think she'd remember it.
22 Not only did Baran lie for Walsh on the disability application,
23 she was instructing Walsh to lie personally on the phone with
24 the federal agency.

25 And Walsh told you, sure enough, the RRB called and

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Summation - Ms. Friedlander

1 asked the exact questions that Baran said they were going to
2 ask, and Walsh told the exact lies that Baran told her to tell
3 and then she got her disability benefits.

4 What Walsh told you is corroborated by the emails that
5 we've shown you from her RRB file, the documents which show
6 that out of the blue, Kathy Quinn, who used to work for Baran
7 at the Westbury office, started inquiring into the status of
8 Walsh's application. The documents show you the RRB told her
9 they had questions for Walsh. The documents show the RRB
10 subsequently called Walsh and got detailed answers to those
11 questions. Those are Government Exhibits 108E and F.

12 The defense spent a lot of time at this trial trying
13 to argue that Marie Baran never used her influence at the RRB
14 to get people disability benefits that they weren't entitled
15 to. First, that argument is totally besides the point since it
16 has nothing to do with whether Baran helped people lie on their
17 disability applications. But leaving that aside, Baran clearly
18 did use her influence for exactly that purpose. That's exactly
19 what she did with Regina Walsh.

20 Now, Marie Baran, of course, testified yesterday that
21 Regina Walsh didn't tell you the truth. Marie Baran testified
22 that Regina Walsh didn't tell you the truth when she said that
23 the statements in the application were Baran's and not Walsh's
24 and when Walsh told you that it was Baran who told her how to
25 answer the RRB's questions.

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Summation - Ms. Friedlander

1 Why was Marie Baran claiming to you that Regina Walsh
2 lied on the witness stand? Marie Baran knows that if you
3 believe Regina Walsh's testimony, it is over for her. Marie
4 Baran is guilty. And let me say, Baran's story that she told
5 you on the stand about Regina Walsh, that the words in the
6 application are Walsh's, make absolutely no sense. Her story
7 makes no sense.

8 She tried at first to say, well, the language in
9 Regina Walsh's application, that doesn't look like the stock
10 language that I used. But as you now know, that application
11 was the first one that Baran filled out completely for a client
12 before she started pre-completing forms with the same stock
13 answers and that's why the language looks different.

14 But more importantly, Baran's story makes no sense
15 because Regina Walsh has no motive to lie to you. She gets
16 nothing from testifying here, and she completely admitted her
17 guilt on the stand. Regina Walsh testified that she knew from
18 the beginning that what she was doing was wrong. She testified
19 that she committed a fraud. It's not like she was trying to
20 push blame off on Marie Baran. Walsh just told you what
21 happened. Baran knows exactly how devastating Regina Walsh's
22 testimony was, exactly how powerfully it proves Baran's guilt.

23 We've talked about how Marie Baran lived off of her
24 husband's disability fraud. We've talked about all the
25 different witnesses who told you that Marie Baran filled their

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Summation - Ms. Friedlander

1 disability applications with lies. How else do you know that
2 Marie Baran knowingly participated in this fraud? Look at the
3 evidence found on her computer.

4 Special agent Ann Marie Cuocci of the FBI showed you
5 that Baran emailed herself completed disability applications
6 containing the dates on which people supposedly became
7 disabled, but that she did that months before the dates on
8 which she was claiming people became disabled. In other words,
9 Baran listed the dates in the future when the applicants were
10 planning to become disabled.

11 What does that tell you? Of course Marie Baran knew
12 this was a fraud. Of course she knew these people were not
13 really disabled. What legitimately disabled person could pick
14 the date months in the future when they would suddenly become
15 too disabled to work another day? But that is exactly what
16 Marie Baran was doing in these applications and it's
17 devastating evidence of her guilt.

18 We showed you several of these during the trial, and
19 I'll just show you a couple examples. Can we put up Simpson.
20 The date on this is June 17, 2008, when Marie Baran emails this
21 to herself, and when does this application say that Simpson
22 became too disabled to work? October 31, 2008, four months in
23 the future.

24 One more example. Can we see John Riddle. Ms. Baran
25 emailed this to herself March 5, 2008. Can we see when

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Summation - Ms. Friedlander

1 Mr. Riddle supposedly became too disabled to work anymore?

2 October 31, 2008, she completed this seven months in advance of
3 the day on which John Riddle supposedly became disabled. This
4 is devastating evidence that Baran knew that she was lying for
5 people.

6 Of course, we can't leave the subject of the computer
7 evidence without reminding you of the blank application that
8 you saw during the trial, an application just like the other
9 two that we looked at but that had no name filled in. She
10 called it blank. Can we just take a quick look at that.

11 Here Marie Baran emails herself what she calls a blank
12 application dated September 4, 2008. In what way is it blank?
13 Well, there's no person listed there, there's no name, there's
14 no address; but it is prefilled out with lies about this
15 person's physical condition.

16 Can we just see Section 6. This is the blank
17 application. Identical responses to all the responses you've
18 seen. Caught red-handed with applications found on her
19 computer that she prefilled out in advance, Baran tried to
20 explain away this devastating evidence when she testified. She
21 testified that she filled out these applications in advance
22 with the same stock answer to remind herself to go over the
23 questions with the clients.

24 What? That makes no sense. The questions are written
25 on the form. That would be a much better reminder of the fact

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Summation - Ms. Friedlander

1 that you need to go over the questions. She could just read
2 her clients the questions from the form. That is exactly, of
3 course, what her own witness, Michael Jansen, the district --
4 the former district manager from the RRB Detroit office told
5 you he would do. You just read the questions. Baran's
6 explanation was preposterous.

7 You also know it's not true that Baran was trying to
8 accurately report information in people's disability
9 applications by looking at Government Exhibit 17. That's the
10 compilation we looked at earlier that contains dozens of nearly
11 identical answers to question 40.

12 You also know it's simply not true that Baran changed
13 the answers to Section 6, asking about people's physical
14 condition, because after speaking with her clients, as she was
15 suggesting to you from the stand, because she almost never
16 changed these answers.

17 We showed you the analysis of the disability
18 applications of 180 of Baran's clients, and the answers were
19 virtually identical. Let's just see the analysis. Almost a
20 hundred, over 90 percent of people found it difficult to bathe
21 themselves. Nearly a hundred percent find it hard to walk?
22 This is ridiculous.

23 It shows you, contrary to what the defense has argued,
24 that Baran used these cookie cutter, prefilled out applications
25 with a huge number of people again and again. She did it

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Summation - Ms. Friedlander

1 because these were the lies that worked.

2 How else do you know that Marie Baran knowingly
3 participated in this fraud? This legitimate business, the
4 legitimate consulting business we keep hearing about was so
5 legitimate, that she lied through her teeth to the government
6 about it on her tax returns from the get-go. She lied about
7 all the money she was making. Why? Two reasons, both
8 fraudulent.

9 First, as Baran herself explained on the stand, at the
10 time she was earning a small extra federal pension that was
11 subject to an earnings restriction. If Baran reported more
12 than a small amount of income from this consulting income, that
13 extra pension would be reduced or eliminated. So to keep
14 collecting that small extra pension, which she knew she wasn't
15 entitled to because she earned so much money from her business,
16 Baran lied and drastically underreported her income on her tax
17 returns. She falsely claimed to have earned just \$14,400 that
18 year from her consulting, when in truth as she fully knew she
19 earned over \$67,000 that year, all of it in cash.

20 Baran made her clients pay cash. Remember Regina
21 Walsh told you she tried to pay with a check and Baran made her
22 go out and get cash instead? Baran testified in front of you
23 yesterday that she only made people pay cash because some of
24 her clients' checks had bounced. That is such a bogus claim.
25 Regina Walsh was her first client. No checks from other

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Summation - Ms. Friedlander

1 clients have bounced.

2 And Baran herself described Walsh as a friend. She
3 really wants you to think she was worried that Regina Walsh's
4 check was going to bounce? That was a totally false
5 explanation. Baran made them pay cash so she could hide her
6 income from the federal government because cash is not
7 traceable.

8 Baran tried to explain away her false tax return
9 yesterday by saying it was all a big misunderstanding. She's
10 just not very good at that business stuff. She just didn't do
11 much to keep track of it. Are you kidding? When the FBI
12 knocked on her door in 2008 to ask her about this consulting
13 business and whether she reported her income to the IRS, what
14 did she say? Did she say of course I report my income? Did
15 she say, well, I sure do my best? No. She told the agents her
16 income was between her and the IRS.

17 Baran said that because she knew she knew she hadn't
18 reported the vast majority of her income. She knew it and you
19 know she knew it because the next thing she did was call her
20 tax preparer urgently to say she needed to meet with him. John
21 Chirichella, her tax preparer, told you about that meeting. He
22 described his shock when Baran came urgently to his office and
23 said the FBI had interviewed her about her consulting business
24 and she needed to restate her 2007 tax returns.

25 She wants you to think she hadn't done much to keep

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1 track of her income. She told Chirichella on the spot how much
2 she really made. She told him right in that very meeting.
3 Baran knew exactly how much she really earned. She knew
4 exactly what she was doing when she lied under oath in a huge
5 way on her tax return.

6 And, of course, since 2008, when the FBI came knocking
7 at her door, she's been reporting all of her income from this
8 business and planning for her defense in this case. Why else
9 is her false tax return in 2007 such powerful evidence against
10 Baran? It shows you this wasn't a legitimate business. This
11 was a fraud from the get-go.

12 It also shows you that Baran had fraudulent intent.
13 She wants you to think she would never lie to help people get
14 benefits from the government that they don't deserve. But this
15 shows you of course she would. She was doing that for herself
16 on her own tax return.

17 Now, I want to take just one moment before I turn to
18 Joe Rutigliano to show you the huge profits that Marie and Gus
19 Baran have made from their fraud. One quick chart.

20 Here we've broken out the income earned by Marie Baran
21 as reported in her tax returns, including the amended 2007
22 return. This is her income on the left from her disability
23 consulting business. It shows you she's earned over \$370,000
24 from this business. The middle column, that shows you Gus
25 Baran's disability income from this fraud. He made over

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Summation - Ms. Friedlander

1 \$200,000, and those records are in evidence. In total, the
2 Barans have made over half a million dollars in fraud.

3 Ladies and gentlemen, the evidence is overwhelming
4 that Marie Baran knew exactly what she was doing when she helped so
5 many people commit fraud. That chart is the obvious reason why
6 she did it. She profited enormously from the fraud.

7 Before I leave the subject of Ms. Baran, let me say
8 one more word about her testimony. Marie Baran got up in front
9 of you with crocodile tears and tried to explain this all away,
10 but what she said didn't make any sense and was contradicted by
11 all of the independent evidence that you've seen and heard.
12 Her testimony was the testimony of a woman who intends to lie,
13 just like she lied to the IRS, and just like she lied to help
14 countless Long Island Railroad employees commit fraud.

15 Finally, Joe Rutigliano. Like Baran, Rutigliano was
16 an insider who knew exactly what it took to trick the
17 government into paying disability benefits. He worked at the
18 LIRR as a conductor for 27 years and was the president of a
19 union local. Rutigliano committed fraud in multiple different
20 ways in this case.

21 First, like all the other LIRR witnesses that you
22 heard from, Rutigliano committed disability fraud.

23 Second, after he learned how to commit his own fraud,
24 and while collecting disability benefits on the ground that he
25 was supposedly so disabled that he could not do any work at

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1 all, Rutigliano had a job completing other people's disability
2 applications for cash, filling them with the same lies he told
3 his own fraudulent application.

4 And, third, in order to continue his disability fraud,
5 Rutigliano lied to the RRB again in a document that he signed.
6 He lied and told the RRB that he hadn't made any money since
7 going out on disability.

8 So let's talk about each of the ways that Joseph
9 Rutigliano committed fraud in this case. First, his own
10 disability fraud. Like many other LIRR employees who you heard
11 from in this trial, Rutigliano decided he wanted to retire in
12 his early fifties. He started seeing one of the three
13 disability doctors. He started seeing Dr. Lesniewski.

14 Rutigliano and Lesniewski created a paper trail to
15 support a bogus disability application. You heard about some
16 of their lies from Dr. Barron, the government's expert. What
17 did he tell you? Well, as we mentioned earlier, he told you
18 that Rutigliano claimed he had neck pain radiating to his lower
19 back, which is anatomically impossible. Dr. Baran told you
20 that if a patient made that complaint to him, a red flag would
21 go up in his mind immediately and he'd ask himself what is
22 going on here. That's page 1781 of the transcript.

23 Of course, Rutigliano's lie would have been equally
24 obvious to Dr. Lesniewski, but Dr. Lesniewski didn't need to
25 ask himself what's going on here. Lesniewski knew what was

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1 going on here. He knew he was involved in a huge fraud, and he
2 did what he was paid to do. Lesniewski gave Rutigliano
3 disability narrative that same day falsely claiming that
4 Rutigliano had a permanently disabling neck problem. That is
5 devastating evidence of Lesniewski's guilt, as we talked about
6 earlier. It's also devastating evidence of Rutigliano's guilt
7 because, of course, Joe Rutigliano knew that he was lying about
8 the kind of pain he had.

9 On top of that, Dr. Baran told you that Rutigliano had
10 not made a single complaint about his shoulder for two years
11 when he and Lesniewski claimed it as a basis for disability for
12 Rutigliano. Rutigliano knew what a lie that diagnosis was.

13 On top of that, on his knee, Dr. Barron told you that
14 the record shows nothing but a mild knee problem at most,
15 typically common in middle-aged person and totally treatable
16 and curable. The defense suggested that Rutigliano had some
17 kind of serious problem with his knee, but you know that is
18 ridiculous for several reasons.

19 First, there's not a shred of evidence that Rutigliano
20 sought any treatment for his knee for years and years after
21 getting a disability through Lesniewski.

22 What else? Rutigliano was playing golf all year
23 round. Then, in 2008, nine years after he applied for
24 disability, nine years of no treatment, and not coincidentally,
25 just weeks after the New York Times published a photo and a

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1 video of Rutigliano playing golf while on disability,
2 Rutigliano ran over to a doctor in Florida and suddenly started
3 complaining all about his back and knee.

4 Rutigliano hadn't seen an orthopedist in nearly a
5 decade because he had no significant conditions. But now that
6 he'd been outed as a fraud, he ran to a doctor to start
7 preparing for his defense in this case.

8 Even then, as you now know from Dr. Barron's
9 testimony, the doctor in 2008 found almost nothing wrong with
10 Rutigliano. Dr. Barron reviewed those records with you, the
11 records from Dr. Ferderigos. He walked you through how they
12 confirm that Rutigliano had nothing wrong with his neck, as
13 Rutigliano had claimed when applying for disability, nothing
14 wrong with his hands, as Rutigliano had claimed, no arthritis
15 in his knee, and nothing wrong with his shoulders, all as
16 Rutigliano and Lesniewski had falsely claimed.

17 On top of that, as Dr. Barron told you, the doctor in
18 2008 didn't find any significant meniscal tear in Rutigliano's
19 knee or any significant back problem. Dr. Barron told you the
20 MRI report of the knee showed nothing but, quote, a pretty
21 typical wear-and-tear type of tear for active people that's
22 pretty isolated, pretty small, stable, and quite treatable.

23 What does that tell you? It's just another way you
24 know that not only was Rutigliano not disabled, but most of his
25 supposedly disabling conditions were just fabricated. And any

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1 pain he had didn't bother him enough to complain about it until
2 after the New York Times exposed his fraud.

3 Dr. Barron also told you that if Rutigliano was able
4 to play golf, he certainly didn't have the serious conditions
5 that he and Lesniewski pretended he did. And as you now know,
6 Rutigliano is an avid golfer playing every week, sometimes
7 multiple days a week, all year long.

8 We introduced records showing that Rutigliano signed
9 in to play golf over 100 times in New York in the spring and
10 summer from 2004 to 2008. And on top of that, you've seen
11 records of him playing hundreds of times at Heritage Springs in
12 Florida, Rutigliano's winter home.

13 You saw records of Rutigliano playing in golf league,
14 golf tournaments, playing 18 holes of golf every week,
15 sometimes multiple times a week. You also heard from Roger van
16 Etten, the golf pro at Heritage Springs. Just like Dr. Barron,
17 van Etten told you that golf is stressful on the back,
18 shoulders, and knees, all areas that Rutigliano claimed as
19 basis for disability. And just like Dr. Barron, van Etten told
20 you that people who actually have serious carpal tunnel
21 syndrome, which Rutigliano claimed to have, can't even hold a
22 golf club.

23 What else did he tell you? He told you he's seen
24 Rutigliano not only playing golf, but riding his bicycle and
25 enjoying time at the pool, all while Rutigliano is supposedly

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Summation - Ms. Friedlander

1 totally and permanently disabled. And, of course, you've seen
2 Rutigliano playing golf, and of course I mean in the photograph
3 and the video that were taken by the New York Times and shown
4 in this trial. Here they are.

5 (Video recording played)

6 MS. FRIEDLANDER: Do we have the photograph? We did
7 it. OK.

8 What does this tell you? Obviously this tells you
9 Rutigliano is not totally and permanently disabled. He lied in
10 his disability application. He lied to get disability money
11 that he wasn't entitled to.

12 Let's see just how much money Rutigliano got through
13 these lies. Since he's been on total and permanent disability
14 beginning in 2000, Joe Rutigliano has collected over \$400,000
15 in disability benefits.

16 Now let's look at the lies he told to get all that
17 money. Can we see his disability applications, Section 6.
18 This application is just littered with lies. Rutigliano
19 pretended it was hard for him to sit, to stand, to walk. He
20 even said he has so much pain that it was hard for him to hold
21 a pen long enough to write a note. That's at the bottom. Too
22 painful to grip a pen, but not too painful to grip golf clubs
23 all year.

24 Can we see question 40. Look at his description of a
25 normal day. It says he can't take more than a short walk

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1 because too long a distance is just too painful. He used to
2 play racquetball and tennis, but he cannot play these sports
3 anymore due to his painful back, knee, and hands. He likes
4 reading and movies but he has to get up and stretch every five
5 to ten minutes because he's in so much pain.

6 This is an utter lie. It is a work of fiction that
7 Rutigliano then copied over and over and over again to help
8 others scam the government the same way he did. And by that of
9 course I mean that like Marie Baran, Joseph Rutigliano didn't
10 just live off his fraudulent disability benefits. He also
11 started his own disability fraud business.

12 You heard from two different Rutigliano clients, Chris
13 Parlante and James Maher. They both told you they were
14 conductors with Rutigliano at the Long Island Railroad. They
15 both told you that Rutigliano retired before them and that
16 after he retired, Rutigliano became well-known for completing
17 people's disability applications for cash.

18 As you heard, Rutigliano completed each of their
19 applications and he charged each of them a thousand dollars for
20 that service. Each of them told you Rutigliano never asked
21 them anything and they never told him anything about their
22 physical condition. They never acted like they were in pain or
23 suffering with Joe Rutigliano.

24 How do you know that they're telling you the truth?
25 Well, you've seen the applications and the vocational reports

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1 that Rutigliano completed for them, and they are virtually
2 identical to Rutigliano's own fraudulent application and
3 vocational report. Just like Marie Baran, Rutigliano used
4 certain cookie cutter language again and again, language that
5 he took from his own bogus application.

6 Let's take a quick look at their application which
7 Rutigliano completed and just compare them with Rutigliano's
8 own. Can we just maybe see a couple of the lines from
9 Section 6. You can see that these descriptions of sitting,
10 standing, and walking are almost identical. Rutigliano says
11 it's hard for him to sit because he has back and knee pain when
12 sitting for more than short periods.

13 Maher, no surprise, sitting is hard for him because he
14 has back, neck, and right knee pain when sitting for long
15 periods. Parlante, sitting is hard for him because he has neck
16 and back pain when sitting for more than short periods, again
17 and again and again.

18 And let's just see one paragraph of their vocational
19 reports compared. Parlante -- these are paragraphs from
20 Parlante, Maher, and Rutigliano, from the vocational reports
21 they submitted to get disability. Both Parlante and Maher told
22 you that these reports are not true about what their jobs
23 required. They're not true in stating that they were suffering
24 pain and couldn't do their jobs.

25 Of course they could do their jobs. They were working

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1 overtime to increase their pensions. They told you they never
2 told Rutigliano any of the things that Rutigliano wrote here
3 about them not being able to do their jobs and he never asked.
4 And you know that's true because all of Joe Rutigliano's
5 vocational reports are nearly identical.

6 It's not just Parlante and Maher. You have in
7 evidence Government Exhibit 19A. It is a large binder
8 containing 135 of Rutigliano's cookie cutter vocational
9 reports. Look at them in the jury room. Flip through the
10 binder. This is it, identical vocational reports created by
11 Joe Rutigliano. You'll see that the lies that worked for him
12 he spun out again and again and again because he knew they
13 would work for others too.

14 You also saw Government Exhibit 19, which shows you
15 that Rutigliano, it wasn't just his vocational reports that
16 were identical, it was the applications too claiming that
17 virtually all the same activities were difficult or impossible
18 for people to do. You can see on the screen 100 percent of his
19 clients found hard or impossible to bathe themselves? That is
20 simply preposterous.

21 How else do you know that Joe Rutigliano knowingly
22 participated in this fraud? Well, just like Marie Baran,
23 Rutigliano lied to the government on his tax returns about the
24 money that he was making from this business. You heard from
25 the IRS witness and you have in evidence Rutigliano's tax

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1 return information for years after he retired, 2000 to 2007,
2 and it shows that Rutigliano never at any time reported that he
3 was earning income from his work in these years.

4 Rutigliano lied to the government under penalty of
5 perjury year after year, just like he lied to the government on
6 his disability application, just like he helped others to lie
7 on theirs.

8 So why did he hide this income besides to avoid paying
9 taxes? Two reasons, both arising from the fraud.

10 First, as you know, Rutigliano was on total and
11 permanent disability. He knew that if he told the government
12 he was earning money, he risked raising a red flag that he was
13 not in fact a completely physically disabled person who is
14 unable to perform any work. He didn't want to tell the
15 government that he was not only capable of working, but
16 actually working and earning money from his work as a
17 consultant. He didn't want to get caught.

18 On top of that, by hiding his income, Rutigliano
19 enabled himself to continue receiving disability benefits which
20 would otherwise have been cut off because, as you heard, the
21 RRB has earnings restrictions for people on disability. You
22 heard from the RRB witness, John Coleman, that people on
23 disability can only earn a small amount of money from any work
24 or the government will start reducing or eliminating the
25 benefits. And that makes sense because, as he told you, the

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1 government doesn't want to pay disability benefits to people
2 who are working.

3 Mr. Coleman told you that people on disability are
4 required to inform the government if they start working and if
5 they earn any money and Rutigliano knew that. He knew it from
6 his disability application which says it right above where
7 Rutigliano signed. And he knew it from the yearly notices he
8 got in the mail which you saw in the trial. Can we just see
9 the signature block.

10 That's Joe Rutigliano's signature on his disability
11 application. Are you able to blow up -- it says he will
12 promptly notify the government if he starts working. Maybe if
13 you want to just do one at a time.

14 OK. You see above his signature, I agree to
15 immediately notify the RRB if I perform any work including
16 self-employment.

17 And can we see the yearly notice that Mr. Rutigliano
18 received? He gets this in the mail every year. You must
19 notify the railroad retirement work if you perform any work,
20 including self-employment.

21 But Rutigliano knew that if he did that, he'd start
22 losing his disability benefits so he hid it. And unlike Baran
23 who got caught and had to restate her tax return and start
24 reporting all her income, Rutigliano skated by without ever
25 reporting a penny.

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1 That leads me to the third way, the third and final
2 way that Rutigliano defrauded the government. Let's take a
3 look at Government Exhibit 719. This is a disability update
4 report. You've seen a number of these in the trial.
5 Rutigliano signed this on March 11, 2011, and mailed it to the
6 RRB in Manhattan. In it, the RRB specifically asked Rutigliano
7 whether he had worked at all since he went out on disability in
8 April 2000.

9 So there's the question up at the top. During the
10 report period, did you work for someone other than a railroad
11 or were you self-employed? Here Mr. Rutigliano writes no, no,
12 he wasn't. There's a signature and the date. The report
13 period you can see from the first page refers to the time since
14 he's been out on disability in April 2000.

15 (Continued on next page)

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Summation - Ms. Friedlander

1 Of course you know this is a lie. You know it from
2 all the evidence in the case. Maher paid him in 2003, Parlante
3 paid him in 2005. You have a binder of all the work that he
4 did for other people. You heard that he was well known for
5 doing this work. Rutigliano lied again and again so he could
6 keep getting his bogus disability benefits.

7 He lied because he didn't want the government to know
8 that he's physically able to work and he always has been. He
9 never should have received a disability in the first place.

10 Before I sit down, I need to talk very briefly about
11 the charges in the case. Each of the defendants is charged
12 with a number of counts.

13 For the most part there are two kinds of crimes
14 charged. First, is the charge of conspiracy, in this case
15 conspiracy to commit mail, wire and health care fraud and fraud
16 on the Railroad Retirement Board.

17 Second, they are charged with committing actual fraud,
18 not just conspiracy.

19 Now, Judge Marrero will talk to you a lot more about
20 the law and you should follow his instructions on the law. But
21 a conspiracy, as I think he will tell you, is just an agreement
22 by two or more people to try to violate the law.

23 He will tell you more about that, and follow his
24 instructions, but what I think you will hear is that the
25 agreement doesn't have to be written, it doesn't have to be

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Summation - Ms. Friedlander

1 shown. It is a meeting of the minds.

2 As for health care, wire, and mail fraud, health care
3 is simply a fraud on a health care insurance provider, in this
4 case United Healthcare, which had to pay Lesniewski for all
5 these pointless visits and bogus tests.

6 Wire fraud is simply a fraud that uses wire
7 communications, meaning the telephone calls and the e-mails and
8 the direct deposit money transfers that you have heard about in
9 this case.

10 Mail fraud is simply a fraud that uses the mail. We
11 have shown you, we actually just saw the disability update
12 reports mailed by people to the RRB's office in Manhattan. We
13 just saw one on the screen related to Mr. Rutigliano.

14 Mr. Rutigliano is charged with one additional count
15 based on that disability update report. He's charged with
16 making a false statement to a government agency.

17 Finally, Judge Marrero will tell you about venue,
18 which just means something that happened in this district, the
19 Southern District of New York, which includes Manhattan and
20 some other places.

21 You heard about things mailed to Manhattan, we just
22 talked about that, and you have a stipulation that wires were
23 transmitted through waters surrounding Long Island. Those
24 waters as you will hear are part of this district.

25 Ladies and gentlemen, let me conclude by asking you,

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Summation - Ms. Friedlander

1 as you enter your deliberations, to please do the three things
2 that Mr. Tehrani asked you to do at the start of the trial:

3 Focus on the evidence about Lesniewski, Baran and
4 Rutigliano;

5 Listen to Judge Marrero when he gives you instructions
6 on the law; and,

7 Finally, use your common sense.

8 No matter how complicated the defense tries to make
9 it, these defendants committed a straightforward fraud. Peter
10 Lesniewski, Marie Baran, and Joseph Rutigliano would and did
11 say anything they had to say to make a quick buck. They
12 deliberately exploited a safety net meant to protect the
13 disabled, and they did it out of sheer greed. That is what
14 happened in this case.

15 There is a mountain of evidence. The evidence is
16 clear, it's corroborated, and it all points in one direction.
17 The defendants are guilty as charged.

18 Thank you.

19 THE COURT: All right. We are going to take the lunch
20 break at this point. It is about 1:20. We will return in one
21 hour.

22 Again, even though the parties have rested and you
23 have heard the closing arguments from the government, you are
24 not yet ready to begin any deliberations or discussions among
25 yourselves or with anyone else on the outside about the case or

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Summation - Ms. Friedlander

1 have any contact of any kind. If any of these things occur,
2 you are directed to inform me immediately and not discuss it
3 with your fellow jurors. We will see you in one hour.

4 (Continued on next page)

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Summation - Ms. Friedlander

1 (Jury not present)

2 THE COURT: All right. Thank you.

3 Mr. Durkin, did you have something?

4 MR. DURKIN: I do, Judge, I have two issues I want to
5 raise in the form of a motion for a mistrial.

6 The first deals with the repeated efforts by the
7 government to appeal to the prejudice of the jury as taxpayers
8 that this was some type of horrible ripoff of a safety net so
9 to speak. I think she used the term "safety net" a couple
10 different times. This was federal money and the people were
11 going to Florida and living lives of leisure off of the federal
12 government.

13 First of all, I think that's over the top and
14 inappropriate.

15 Secondly, factually, it is not even correct because
16 this is a program that is not funded by tax dollars. It is
17 funded by contributions by the employees. I think there is, of
18 all the monies that are provided from the general fund, it is
19 minuscule compared to the payments of the workers. And I think
20 it's simply inappropriate to have tried to appeal to the
21 pocketbooks and prejudice of the jury over that.

22 The second issue is an issue with respect to the
23 suggestion by the government that this was a very simple form
24 and it was inappropriate to be filled out, and this may well be
25 something that my colleagues would want to raise more than me.

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Summation - Ms. Friedlander

1 But the problem I have, I want to show you, I am just going to
2 provide you with a document that we were provided on Sunday
3 night after the RRB person testified. It was a week ago
4 Sunday. I am just going to mark it Mistrial No. 1 of today's
5 date.

6 It was this Sunday that we received it. That's what I
7 thought. I'm the oldest of this team, and sometimes these
8 younger people make me confused, but for once my memory is
9 correct.

10 This is a document that we were provided by the
11 government. It is supposedly from off of the Internet. It's
12 from some type of Social Security application which is
13 identical or similar to the forms for the RRB. I don't have an
14 extra copy of it.

15 I am assuming it was turned over because it is Brady
16 material. It reads: "Form AA-1d is very detailed. When
17 possible, help the applicant complete it."

18 I just think, in light of that, it was inappropriate
19 to stand up and vouch, the prosecutor, it was inappropriate for
20 the government to use their office to vouch for the fact that
21 this was a simple proposition.

22 That is all I have, your Honor.

23 THE COURT: All right. Thank you. Mr. Weddle.

24 MR. WEDDLE: Your Honor, it was completely fair
25 argument, nothing improper was said at all. It is all

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Summation - Ms. Friedlander

1 supported by the evidence in this case. The fraud is a fraud
2 on a federal program. It is federal money that was defrauded.

3 There was no appeal to the taxpayers. Ms. Friedlander
4 didn't say the words "taxpayers."

5 This is RRB disability money. It's the same thing we
6 have been talking about the entire case. It was a massive
7 fraud, and we argued that in opening and we are going to
8 continue to argue that. That is exactly what the government
9 has proven.

10 She did mention Social Security at one point because
11 Social Security gets involved when there is a total and
12 permanent disability payment, as I believe she was referring
13 specifically only to Mr. Rutigliano at that part of the
14 argument.

15 With respect to the document that's just been handed
16 to your Honor, it changes nothing. The form speaks for itself.
17 It is a basic simple form. The fact that a document says that
18 the form is detailed and that I believe -- I don't have it in
19 front of me -- but I believe it's some kind of internal RRB
20 guidance to their contact representatives, their customer
21 service people, it proves our point.

22 If somebody has any problem filling out the form, it
23 says help them with it. It is a simple form. You can go to
24 the RRB, they will help you fill it out for free.

25 Ms. Baran's own witness testified to those same facts.

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Summation - Ms. Friedlander

1 This was completely fair argument, and there is absolutely no
2 basis for an objection, let alone a mistrial.

3 THE COURT: All right.

4 Anyone else?

5 MS. YRIZZARY: Your Honor, Mr. Jackson wanted to say
6 something. He just went to the restroom real quick. I do
7 apologize.

8 THE COURT: While we wait for Mr. Jackson, I have
9 heard the concerns of Mr. Durkin. I am not persuaded that
10 there is a sufficient basis here for a mistrial, certainly not
11 on the basis of this form or the arguments made during the
12 government's closing arguments. I believe that they are fair
13 comments and that they open issues for the defense to counter.
14 They certainly don't rise to the level of grounds for mistrial.
15 So, insofar as Mr. Durkin is making a motion for a mistrial,
16 the motion is denied.

17 Mr. Jackson, did you have some comment or concern?

18 MR. JACKSON: I do.

19 Judge, I had specifically objected to an exhibit that
20 the government had intended to introduce that dealt with the
21 grouping of Mr. Baran's income that he derived by virtue of his
22 disability -- which is total and permanent, completely lawful
23 and legitimate, as I will certainly be explaining this
24 afternoon -- in with the income that Ms. Baran received from
25 her lawful, legitimate business that she ran as a consultant.

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Summation - Ms. Friedlander

1 I objected to it. The government did not introduce it, I
2 thought based upon my objection. There is a record at the
3 sidebar I think we had where you said that we should work it
4 out.

5 There was an e-mail generated that evening after you
6 said we should work it out. I guess it led into the weekend,
7 and in the e-mail I reiterated some of the concerns that your
8 Honor had expressed at the sidebar as to why I would be opposed
9 to it.

10 At that time not only was it cumulative, but I thought
11 it was overly prejudicial and the very document that I objected
12 to that wasn't introduced into evidence was referenced to close
13 out the prong of Ms. Friedlander's closing that dealt with
14 Ms. Baran.

15 As opposed to jumping up and objecting frantically,
16 which I thought would give even more undue attention to this
17 misleading chart and inappropriate chart, one that I thought
18 would never see the light of day of this jury, I reserved until
19 now a discussion with you as to how that might have happened or
20 could have happened in light of the objection, in light of the
21 fact that exhibit was never put before the jury and I thought
22 would never see the light of day but surfaces in front of the
23 jury during closings without any notice to me. I didn't even
24 have the document.

25 I just think, Judge, that certainly there needs to be

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Summation - Ms. Friedlander

1 some remedy that is tailored to address that issue.

2 THE COURT: Thank you.

3 Mr. Weddle.

4 MR. WEDDLE: Your Honor, it is a completely fair
5 demonstrative chart to use in summation. It is based entirely
6 on documents that are in evidence. It itself is not in
7 evidence, but that's standard practice in summation to use
8 PowerPoints or demonstratives that are not themselves in
9 evidence, and it's fair argument to take pieces of evidence and
10 put them on a single piece of paper and display it to the jury
11 in argument.

12 It's not going something that is going to back to the
13 jury at end of the case. I was looking for a reference,
14 perhaps Mr. Jackson has a page reference to when he made this
15 argument.

16 My recollection of what happened is that he said that
17 it was cumulative and we have heard the evidence and that it
18 was argumentative.

19 So what we did is we decided to just use it in
20 argument, which is exactly what we did. It's entirely proper.
21 There is nothing to complain about here.

22 MR. JACKSON: Argumentative. I thought that was an
23 objection you use when maybe in cross-examination you are
24 badgering a witness. My concern was the cumulative nature of
25 it is what makes it prejudicial, to keep going over and over

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Summation - Ms. Friedlander

1 and over it again.

2 Just as a general matter, it also would have been nice
3 to give me notice of that. But to do that on an exhibit, I
4 mean I've pretty much stipulated to 85 percent of the exhibits
5 they used. Maybe 90 percent. And the one exhibit I am jumping
6 up and down to -- and there is a record of at sidebar and there
7 are e-mail exchanges between myself and the prosecution -- is
8 the exhibit that they go to and use for closing.

9 THE COURT: All right. I will give the jury a
10 limiting instruction with regards to the testimony and evidence
11 pertaining to Mr. Baran and Ms. Baran. We will find a way of
12 indicating that they should not use evidence pertaining to
13 Mr. Baran in their findings concerning the charges against
14 Ms. Baran.

15 MR. WEDDLE: Your Honor, that instruction would not be
16 proper. He's charged as a coconspirator. So, of course,
17 evidence relating to Mr. Baran is relevant and probative of the
18 charges against Ms. Baran.

19 THE COURT: Well, this is a little different,
20 Mr. Weddle.

21 MR. WEDDLE: The money issue is very straightforward.

22 THE COURT: But on the chart side by side I think is
23 more suggestive than necessary.

24 MR. WEDDLE: Your Honor, it was a very straightforward
25 chart. All of those numbers were in evidence. It is just

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Summation - Ms. Friedlander

1 helpful to the jury to put them in one place.

2 Ms. Friedlander could have taken each of those
3 exhibits and put them on the screen in argument and talked
4 about them all in argument, which would have taken a great deal
5 of time. It was a very brief, very straightforward reference
6 to just tallying up documents that are in evidence.

7 It is a straightforward point. Everybody knows it.

8 Ms. Baran testified about it in when she testified. She
9 testified about the fact that Gus Baran received this money in
10 disability payments. It is straightforward. It demonstrates
11 his motive to commit the fraud. His participation in the fraud
12 is probative of the existence of the conspiracy.

13 THE COURT: All right.

14 I will find appropriate language to reflect the
15 concern, and I will share it with you when we come back.

16 MR. JACKSON: Thank you, Judge.

17 THE COURT: All right.

18 (Luncheon recess)

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Summation - Ms. Friedlander

1
2 A F T E R N O O N S E S S I O N
3

(2:40 p.m.)

4 (At sidebar)

5 THE COURT: In connection with the issue that came up
6 pertaining to the chart that Ms. Friedlander raised and
7 Mr. Jackson objected to, three points:8 One is that I think the government is right, and I was
9 not intending to suggest that because of the use of this
10 material that nothing in the trial that has come in pertaining
11 to Mr. Baran would not be relevant to Ms. Baran. That was not
12 my concern. I had two concerns.13 One is Ms. Baran has a unique connection in this case
14 because she happens to be the spouse of someone who was
15 involved in some of the underlying events. This chart showing
16 those two, the events pertaining to one insofar as one made
17 money and the other made money, linked together can create a
18 potentially improper view with the jurors that because they
19 happen to be married that somehow that association by itself
20 may spill over into Ms. Baran.21 Secondly, the chart is only one piece of evidence with
22 a lot of evidence in the case, and I would not want the jury to
23 single out one item of information in the case and make its
24 decision simply on that one thing, especially when it contains
25 this potential prejudicial association by marriage of Ms. Baran

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Summation - Ms. Friedlander

1 to Mr. Baran.

2 I am prepared to give an instruction which says the
3 following:

4 During its closing arguments, the government presented
5 a chart which showed the amounts of money that the government
6 argues the evidence on the record establishes Marie Baran and
7 her husband, Ostap Baran, each gained from conduct that the
8 government contends forms part of the frauds involved in this
9 case.

10 That chart was not admitted in evidence as an exhibit
11 and will not be part of the trial evidence given to you to take
12 into your deliberations. It was shown to you as a
13 demonstrative because the government points out that the
14 financial information it contains is found in the record
15 separately as to each Ms. Baran and Mr. Baran.

16 I take this occasion to call your attention to a
17 subject I will stress in my complete instructions. As you
18 review the evidence against each of the defendants, you should
19 examine and consider the totality of the evidence and not
20 single out any one piece in isolation.

21 Second, Ms. Baran and Mr. Baran, of course, have a
22 unique connection to this case because of their spousal
23 relationship. In weighing the evidence relating to Ms. Baran
24 you should not consider a verdict for or against Ms. Baran
25 solely on the basis of her association with Mr. Baran by

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Summation - Ms. Friedlander

1 marriage.

2 MR. JACKSON: Judge, I don't want the instruction. In
3 my view it highlights it too much. It makes it too
4 significant. I will have to deal with it in my closing
5 argument, but I don't want to highlight the issue. I don't
6 like the instruction. And it pretty much points out the
7 same -- I mean, if I would have gotten up and objected, I think
8 it steers their focus in an area where you just don't want them
9 to be steered.

10 So I will just address the issue in my closing
11 argument as opposed to giving any instruction from your Honor
12 that might be too weighty and may point unduly to that
13 relationship.

14 It is my contention, and it will be, that there is no
15 fraud as it relates to him, so I don't think the instruction
16 would be helpful in any event. So I don't want the instruction
17 and I will deal with it, as I must or need to, in my closing
18 argument and would ask the Court for some latitude in that
19 regard.

20 THE COURT: Mr. Weddle.

21 MR. WEDDLE: Your Honor, I had the same reaction, and
22 I have an objection to what your Honor proposed to instruct the
23 jury. But I thought that it is a demonstrative and maybe the
24 jury may not be interested in seeing it again and may never ask
25 for it. If they ask for it, they would simply be told it is

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Summation - Ms. Friedlander

1 not in evidence. I think highlighting it in this way, I am not
2 surprised that Mr. Jackson has the reaction that he has. I
3 don't think that there is any need for any kind of leeway. As
4 I said before, I think it was a proper demonstrative exhibit
5 used in summation. It is not in evidence, and it is what it
6 is.

7 MR. JACKSON: I disagree. I think it was specifically
8 an exhibit that I addressed, that I didn't want in evidence,
9 had no notice it would be used in closing argument or I would
10 have brought it up before. I think the government knew I was
11 objecting to it and could have, in light of that, brought it to
12 my attention so I could have renewed it, and we didn't have to
13 waste time now discussing it, but that didn't happen and I will
14 deal with it as I may.

15 THE COURT: Implicit in your having raised the issue,
16 Mr. Jackson, is that you feel that the jury having been shown
17 the document is prejudicial to your client.

18 MR. JACKSON: Of course it is, and they know that,
19 which is why they showed it to them.

20 THE COURT: I am proposing an instruction which I feel
21 might limit the prejudice and somehow remove some of the
22 concerns that you may have. To the extent you don't want me to
23 give this what I consider curative or limiting instruction,
24 essentially you are waiving your objection on this issue.

25 MR. JACKSON: I am not prepared to waive my objection

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Summation - Ms. Friedlander

1 on the issue. I just don't like your instruction. I think it
2 makes it more prejudicial, quite frankly, in highlighting to
3 them something that shouldn't have been highlighted, because it
4 shouldn't have been shown.

5 I feel very uncomfortable with waiving something that
6 shouldn't have been brought up by the government in the first
7 instance, and/or my right a curative instruction that I think
8 might -- I just think that's too prejudicial. It focuses on
9 Mr. Baran too unduly, and I think it highlights that, it
10 highlights the chart, it does precisely the things that I
11 didn't object because of, that I feared, and so therefore I
12 don't like the curative instruction. We can revisit it maybe
13 at the time of your charging the jury, but right now I am not
14 prepared to waive anything, Judge.

15 MR. WEDDLE: Your Honor, I would add that in the lunch
16 break I looked at the transcript when Mr. Jackson raised the
17 objection to this summary chart, and he made two objections.
18 He said that it was cumulative to use the chart, and he said
19 that it was misleading because Ms. Baran, he said, worked for
20 the money that was on the chart. He never raised an objection
21 that the mere association of Mr. and Ms. Baran as husband and
22 wife might be improperly used by the jury.

23 So your Honor's instruction I think is not incorrect
24 obviously. We would not be arguing that the jury should infer
25 guilt because of their marital relationship.

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Summation - Ms. Friedlander

1 But the objection to the chart when it was originally
2 presented was different, and your Honor basically -- I don't
3 think your Honor ruled finally on the issue, but I think your
4 Honor indicated that your view was that the chart was
5 cumulative, which creates no bar or prejudice to using it as a
6 demonstrative during summation, which is what we did.

7 MR. JACKSON: Let me just say this. I just want to
8 clarify the record.

9 Number one, as to cumulative and a ruling by your
10 Honor, your Honor made no ruling. Your Honor indicated that
11 your concern might be that it is cumulative, and therefore
12 indicated that the parties might stipulate or work something
13 out, and, if not, to revisit it with your Honor. There was no
14 formal ruling by you.

15 That is number one.

16 Number two, Judge --

17 THE COURT: Let me put on the record one thing before
18 you get to number two.

19 MR. JACKSON: OK.

20 THE COURT: You may recall that there was another
21 instance about evidence concerning Mr. Baran and Ms. Baran, and
22 at that point I said let's see if we can limit the amount of
23 evidence relating to Mr. Baran that might be used against
24 Ms. Baran, you may recall that conversation, because of the
25 potential prejudice. So it was a concern that I have had

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Summation - Ms. Friedlander

1 throughout the trial.

2 MR. JACKSON: OK.

3 THE COURT: Second point.

4 MR. JACKSON: The second point is, with respect to my
5 objecting on misleading grounds, it was misleading for multiple
6 reasons, not the least of which I thought I needed to explain
7 where misleading went.

8 Of course, it is misleading for the fact that they are
9 husband and wife, and you are accusing her by virtue of
10 associating with him.

11 Misleading, just like the connotations of her
12 ridiculousness and ludicrousness and all the things she
13 mentioned during closing argument, the fact is "misleading" has
14 a number of connotations, none of which I felt I needed to
15 explain, because I think your Honor cut it off, not cut it off
16 in a negative way.

17 You said, Look, work it out, I do have a concern that
18 it's cumulative. We will revisit this issue at a later time.
19 So I just want to be clear to the government's characterization
20 of when I say misleading is that to waive any other objection I
21 might have incorporated in that. That's not so. Misleading
22 for multiple reasons, which I will expound upon at the
23 appropriate time. Thank you, Judge.

24 THE COURT: All right. Thank you.

25 (Continued on next page)

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Summation - Ms. Friedlander

1 (In open court)

2 THE COURT: Bring in the jury.

3 Before the jury comes in, I had indicated to defense
4 counsel that they should allocate the amount of time that is
5 between them. Has that been agreed to.

6 MR. RYAN: Judge I am going to be 20 minutes. No
7 more.

8 THE COURT: All right.

9 Mr. Jackson, yesterday you said you would be 30 to 40.

10 MR. JACKSON: Judge, there is a number of things I
11 need to say, there's a number things I will say, there's a
12 number of things that must be said --

13 THE COURT: And things that should not be said.

14 MR. JACKSON: I am going to leave those out, Judge,
15 because I know what would happen in the event that that did
16 occur.

17 Having said that, Judge, I will use the time frame
18 that I think is appropriate under these circumstances. I will
19 try my level best to work within the confines of the time
20 provided. If I go over a few minutes or go under a few
21 minutes, please don't hold it against me.

22 THE COURT: I am trying to establish how much time is
23 provided.

24 MR. JACKSON: I think with Mr. Ryan's 20 and we have
25 thereby an hour and 40 minutes, and my colleague Mr. Durkin's

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Summation - Ms. Friedlander

1 time, I think we are going to get the train in on time.

2 MR. DURKIN: How much did that leave me? I am a
3 little slow on the draw. I think I just got cheated. I will
4 be as quick as I can.

5 THE COURT: By that computation, Mr. Durkin, you would
6 have roughly an hour.

7 MR. DURKIN: Oh, that's fine. If I go more than an
8 hour --

9 THE COURT: Mr. Jackson, would have roughly 40
10 minutes. All right?

11 MR. DURKIN: That is fine.

12 (Continued on next page)

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Summation - Ms. Friedlander

1 (Jury present)

2 THE COURT: Welcome back. Thank you. Thank you for
3 your patience. All right. At this point the defense, as I
4 indicated, may but does not have to present any closing
5 arguments.

6 If they do, Mr. Ryan are you prepared to lead off.

7 MR. RYAN: I am, Judge.

8 THE COURT: You may.

9 MR. RYAN: May it please the Court, the Honorable
10 Victor Marrero, may it please the prosecution team, and the RRB
11 team in the back of the courtroom, may it please my fellow
12 defense counsel, may it please you, the ladies and gentlemen of
13 the jury, the judges of the facts in this case.

14 Judge Marrero told you at the very outset of this case
15 that you are the cornerstone of the administration of justice.
16 There is nobody more qualified than each and every one of you
17 to be the cornerstone of the administration of justice in this
18 case. You have more than 300 years of life experience, common
19 sense, to be the judges of the facts in this case.

20 You are an extraordinary jury because not one of you
21 were trying to get out of this case. At the outset, when Judge
22 Marrero said, Is there anybody who wants to serve on this case
23 that is going to take four to six weeks? We had people come up
24 and say yes. And then when you were selected, you weren't
25 trying to get out of this. That is a credit to each and every

D7vnles5

Summation - Mr. Ryan

1 one of you because you are the cornerstone of the
2 administration of justice. You are citizens of our great
3 country.

4 And this railing right here stops the government
5 power. You are going to decide this case, not the government,
6 not the charts, not the New York Times. You are going to
7 decide this case.

8 Now, we said that we were going to take a train ride,
9 and it might take four weeks. Well, we are pulling into the
10 station ahead of schedule. We got the best stationmaster you
11 could find. And I promised Judge Marrero that when that clock
12 says 3:10 I'm finished.

13 So I would appreciate it if you could give me, and I
14 know you will, your utmost attention.

15 We learned a lot. I hope you found this to be an
16 enriching experience. We learned what it's like to work on a
17 railroad with third rails all around you that can kill you if
18 you slip and fall the wrong way. We learned what it takes to
19 climb up on to a train from the ballast trackbed.

20 We also learned what physical impact this job has. We
21 learned what is lumbar spine, cervical spine, rotator cuff,
22 carpal tunnel syndrome. We learned a lot about health issues.

23 We learned the impact of unions, and I am proud to
24 represent the president of the United Transportation Union for
25 19 years, Joe Rutigliano.

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Summation - Mr. Ryan

1 When we finish, regardless of what the verdict is,
2 this has been a wonderful experience.

3 Now, I am not going to tell you what your verdict
4 should be. I am not even going to go close to that. I am
5 going to try to reason with you. I am going to try to make
6 suggestions that you might use to help evaluate the evidence in
7 this case.

8 You have never seen, I dare say, a more exhaustive
9 investigation than was conducted in this case, and you have a
10 right to expect that. We have investigative agencies from the
11 Office of Inspector General for the Attorney General, for the
12 inspector for the Railroad Retirement Board, for the
13 Metropolitan Transit Authority, from the FBI. We even had a
14 man from the IRS. They brought him in under a court order.

15 We have a brilliant prosecutorial staff. They are
16 great lawyers, and they did the best they could with what they
17 had.

18 So let's talk about Joe Rutigliano. The government
19 wants you to convict Joe based upon a form that he signed and
20 filed with the Railroad Retirement Board in March of 2011
21 because he answered a question no.

22 Here it is. Exhibit 719.

23 Exhibit 719 asks one of several questions. One of the
24 questions was, "During the report period did you work for
25 someone other than the railroad or were you self-employed?

D7vnles5

Summation - Mr. Ryan

1 "No."

2 So you take this in the jury room, and you say, Well,
3 Mr. Prosecutor, where's the proof of self-employment? How much
4 money was earned? How was it earned. Who worked with him?
5 Where is it?

6 With Marie Baran they got her tax returns, \$80,000 a
7 year. She has deductions on the tax return for the cost of
8 running a business. But when it comes to Joe Rutigliano
9 where's the beef? Where is it?

10 Have you seen any chart that says he was self-employed
11 in 2003 and earned \$20,000?

12 Another chart that said he earned \$35,000 in the next
13 year? Another chart that he earned \$45,000? Where is it?

14 As the judges of the facts in this case, you have a
15 right to ask that question. And if the evidence isn't there,
16 it isn't there.

17 The judge is going to tell you that before you can
18 find anyone guilty you must be convinced beyond a reasonable
19 doubt. What is a reasonable doubt? It a doubt based upon and
20 common sense.

21 You are being asked to convict this man without any
22 evidence. Oh, yeah. Back in 2003 James Maher gave him a
23 thousand dollars. Back in 2005 Chris Parlante gave him a
24 thousand dollars. What else is there?

25 Now, here's where the charts come in. The government

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Summation - Mr. Ryan

1 has a lady in Chicago, very nice lady, Natasha Marx. And she
2 has a computer. And she's getting calls from Mr. Weddle during
3 a nine-month period. Let's go into the computer and let's put
4 in "catch-22" because that's what Joe had on one of his forms
5 in the submissions.

6 And her computer spits out 134 other names.

7 Then they take the 134 names based upon Natasha Marx's
8 computer, and they put it on a chart here and they say, Joe
9 Rutigliano, he's the one who did all of these forms. He's the
10 one who serviced all of these people.

11 Well, you as judges of the facts have the right to say
12 with all of the investigators in this case, well, where are
13 they? Where are they?

14 Charts are not evidence of the underlying
15 transactions, because otherwise we might as well shorten this
16 trial and bring in charts and we will have the chart of
17 Metro-North and the chart of Long Island Rail Road and we will
18 have charts all over the place and we will convict you on
19 charts.

20 You are the cornerstone of the administration of
21 justice. Thank God for that.

22 There is one witness in this case that's not subject
23 to any influence, a witness that is not under a plea of guilty,
24 a witness that is not influenced by the September '08 New York
25 Times article which started the fire.

D7vnles5

Summation - Mr. Ryan

1 You have the RRB claim file, Government's Exhibit 100.
2 This is Joe Rutigliano's claim file, and it is uninfluenced by
3 anything.

4 You will see in this claim file that the railroad
5 retirement examiner in Chicago made a determination that he was
6 entitled to get occupational disability benefits. Someone told
7 you that this was a total and permanent disability case. Well,
8 you can look at the application, and you won't find anything
9 about total and permanent disability under the Social Security
10 law. This is an occupational disability application, 100. I
11 will give you the end of the file by an examiner, who said,
12 "This 52-year-old former railroad conductor claims disability
13 due to arthritis right knee, medial meniscal tear, and carpal
14 tunnel syndrome. He fractured his lumbar spine in a fall in
15 1988."

16 You are going to see in this file there is a report by
17 the chiropractor who treated Joe, that in 1988 he fell from a
18 ceiling in his garage down to the garage floor. And he went to
19 Stony Brook Hospital and he fractured, three compression
20 fractures of his vertebrae.

21 And then you will see Dr. Lesniewski in April of
22 1997 -- it is all in here, in April of 1997, Joe fell from the
23 second floor roof off a ladder. He went to Dr. Lesniewski for
24 his shoulder.

25 You are being told here, ladies and gentlemen, the

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Summation - Mr. Ryan

1 cornerstone of the administration of justice, that he was
2 creating a paper trail. He was creating a phony application.
3 He's laying the groundwork. In that room you will decide
4 whether or not you are getting a straight story.

5 If Joe Rutigliano is falling down like this, maybe
6 this question 40 about mental instability, that's why it's on
7 the form. Maybe he's crazy and he should be disabled because
8 he's crazy, falling off a ladder. He shouldn't be a conductor
9 in charge of your welfare.

10 Then the examiner goes on.

11 "Current exams reveal LOM" -- that is loss of
12 motion -- "in spine showing osteoarthritis and history of
13 compression fractures."

14 I am not going to go on because you have it. I am
15 only suggesting that you should look at it.

16 He also says, per a signed form by Dr. Boetchner, he's
17 limited to less than light work. This is an RRB doctor that
18 reviews the special file. You will also see in this 100 that
19 another doctor, Bernard Stevens, he also reviewed the medical
20 file and the history and he found he was disabled under the
21 meaning of the Social Security law, whatever that means. Joe
22 Rutigliano doesn't meet any one of these two doctors.

23 So I commend to your attention, the judges of the
24 facts, Government Exhibit 100. You go through that and I
25 respectfully submit to you you will have the full story as to

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Summation - Mr. Ryan

1 whether or not the government told you an accurate description
2 that he was fabricating his injuries.

3 Let's talk about Dr. Alton Baran, because golf is a
4 major issue in this case. Did you ever think when you sat in
5 this jury that golf would be a major issue in this case?

6 Dr. Alton Baran has a chart, and he has a column on
7 the right side, "If problem existed as claimed could he play
8 golf?"

9 Dr. Barron is referring to 100 because
10 Dr. Lesniewski's findings are in this 100, and they have this
11 question, no, no, he can't play golf.

12 Well, ladies and gentlemen of the jury, would it
13 surprise you -- I am going to make a chart up right now, 2004.
14 This chart deals with when Joe was working on the railroad,
15 1999. The government's so-called golf proof doesn't start
16 until 2004, and the video was in 2008. So are you being told a
17 straight story by putting on this Government's Exhibit 453, "If
18 problem existed as claimed could he play golf"?

19 He wasn't playing golf in 1999. He was on the
20 railroad. Do you think after not working on the railroad some
21 of your conditions are going to subside?

22 By 2008 he's before a doctor, a respected doctor even
23 by Alton Barron's view, who says the shoulder is better. The
24 hand is better. The knee, you still got the tear. And your
25 back, you need four needles, you need an epidural injection,

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Summation - Mr. Ryan

1 and he gets it.

2 Is someone trying to mislead you here? That's not for
3 me to say. That is for you to determine.

4 This whole idea of playing four hours a week during
5 the week on a manicured golf course means that you can spend 40
6 hours working on the railroad. You may find to be absurd,
7 whatever it is, but that's the proposition that you are being
8 asked. Because a man can go out with his buddies for four
9 hours in the fresh air and swing a golf club that Roger van
10 Etten says weighs less than two pounds, you are being asked to
11 find that Mr. Rutigliano should be working on the railroad. He
12 shouldn't be on the golf course.

13 He should be working on the railroad when the job
14 specification requires that he lift up to 95 pounds. And then
15 he has to, if he is going from the trackbed and he has to get
16 back on the train after throwing the switch or uncoupling a
17 car, he's got to get back to the car, he's got to put his foot
18 on a 32-inch step and he's got to grab the rail by the right
19 hand and then he's got to pull himself up, his whole weight,
20 and onto the train. They say because he can swing a golf club,
21 he should be able to do that.

22 There were two witnesses who testified, Maher and
23 Parlante. Both of them told Joe they were hurting, they had
24 pain. James Maher, it was ten years ago that Maher met Joe.
25 Ten years ago. I got pain in my neck, I got pain in my lower

D7vnles5

Summation - Mr. Ryan

1 back. OK. And Maher was examined by a doctor after he got the
2 approval by the RRB. And guess what. The RRB doctor found
3 that he was occupationally disabled still.

4 Now, Christopher Parlante is a conductor who can't
5 avoid getting hit by a train. He is embarrassed. He's knocked
6 out for weeks.

7 He tells Joe when he goes for the form, Don't tell
8 anybody, but I got hit by a train. And you are being asked to
9 find that, even though he was hit by a train, this is a man
10 capable of resuming his duties on the Long Island Rail Road as
11 a conductor for your safety and the safety of themselves.

12 Two witnesses, both admit they had injuries, both
13 admit they had pain, and one of them even says went to Joe
14 because he was great man. He was a union leader. I didn't go
15 to him to fabricate anything.

16 Both of them say you know when government confronts
17 them with some language, this so-called telltale language that
18 they talk about, Well, I didn't read it until after my arrest
19 seven years later. And the other one says, Well, I was rushing
20 to get to the office, the Westbury office. I didn't have time
21 to look at it.

22 So we are down to two witnesses out of what? The
23 government says there was 134 available. And you are asked to
24 convict Joe on this kind of evidence.

25 I am going to keep my promise. It is tough for me to

D7vnles5

Summation - Mr. Ryan

1 sit down, it is tough for me to get off this train, but I know
2 when I get off this train and I walk out of this courthouse and
3 I go home, I know I did the best I could.

4 And I have every reason to believe that Joe deep down
5 has every reason to believe that when you get off this train
6 and you finish your jury duty and you go home and you meet your
7 family members and friends that you will be able to explain
8 your verdict without any hesitation whatsoever.

9 I render my verdict based upon reason and common
10 sense, and I don't care what any newspaper says. I'm the only
11 one who really saw the evidence in this case.

12 You are the only ones who saw the revelation and the
13 honesty and the openness of the Railroad Retirement
14 occupational disability. You are the only ones who know what
15 occupational disability is.

16 You can't perform one or more tasks. We don't want
17 you to on the train if you are not a hundred percent for your
18 own good and for the good of all the people who travel in your
19 custody.

20 You are the only ones who know.

21 This idea that because the Metro-North workers are not
22 filing occupational disability claims at the rate of the Long
23 Island Rail Road, which was the crux of the New York Times
24 article taken from an audit of the MTA, you know the reason.

25 God bless you, ladies and gentlemen. Good luck.

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Summation - Mr. Ryan

1 THE COURT: Thank you, Mr. Ryan.

2 MR. RYAN: How am I doing?

3 THE COURT: You did fine.

4 Mr. Jackson.

5 MR. JACKSON: Yes, Judge.

6 THE COURT: Let's see you do just as fine.

7 MR. JACKSON: We are going to give it a shot, your
8 Honor. A pleasant good afternoon, ladies and gentlemen. I
9 hope all is well. Thank you for sitting here, for listening,
10 for being attentive, responsible, wonderful individuals,
11 citizens, and jurors.

12 Yesterday we spent a lot of time speaking about
13 character. You remember that, right?

14 We spent time speaking about character because we had
15 the pleasure of hearing from witnesses who were familiar with
16 Ms. Baran.

17 In fact, one such witness, a person that had 31 years
18 at the Railroad Retirement Board, came in here from Michigan.
19 And from his travails and travels in Michigan, he talked about
20 values, he talked about honesty, he talked about integrity, he
21 talked about decency.

22 He was Ms. Baran's contemporary in Detroit. He did
23 exactly what she did only in another state. He came here and
24 he talked to you about that character and about her character
25 and about her reputation for honesty, her reputation for

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Summation - Mr. Jackson

1 integrity and what that was all about.

2 He wasn't the only one to do that, because you also
3 heard from Ralph Domenici. And ralph Domenici, who knew and is
4 aware and familiar with Ms. Baran for over 40 years,
5 additionally talked about character and talked about reputation
6 and integrity and how all those words apply to Ms. Baran as she
7 sits there and how meaningful it is to have someone who knows
8 you, who trusts, you who knows about you to speak to those
9 issues of character, decency and integrity.

10 But you see when you don't have character, when you
11 don't have honesty, when you don't have integrity, or if at
12 least you don't have witnesses who have those qualities, you
13 resort to attacks.

14 Therefore, and I will discuss the lack of character of
15 the witnesses that you had to hear from, but when you don't
16 have the integrity and the character and the honesty you assail
17 someone not by way of evidence, but by way of family.

18 Let's get to your family. And what did you see here
19 perpetrated upon you. You saw Mr. Baran repeatedly attacked
20 and you saw a golf video of him playing golf and that was to
21 suggest to you that somehow he's defrauding the system, a
22 person who spent 25 years making railroads safe, spending 25
23 years in ensuring, as Ralph Domenici told you, that the 350,000
24 passengers who ride that train every day are safe, secure, and
25 they get home to their families. And there are not you can

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Summation - Mr. Jackson

1 infer the derailments and there are not people who are
2 subjected to danger because of the hard work that people like
3 Gus Baran did and the people like Ralph Domenici did.

4 (Continued on next page)

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D7VLLES6

Summation - Mr. Jackson

1 MR. JACKSON: So instead you're shown a video where he
2 plays golf three times a week and you're asked to and the
3 suggestion to you is drawn that somehow he's not disabled,
4 right, that's not a fact that relates to Ms. Baran and
5 corruption and fraud. It's a fact that diverts you to a side
6 show and a side issue to attack her husband and attack her
7 family.

8 So let's talk about that. And what evidence did the
9 government suggest to you would make it clear that he's not
10 disabled, total and permanent? Now, just to make myself clear,
11 this trial is about occupational disability, and I gather from
12 what the government turned it into about Mr. Baran being total
13 and permanent, the definition is not holding a job in the
14 national economy.

15 And Mr. Ryan addressed that issue when he talked about
16 four hours of golf a week and how you can possibly convert that
17 into 40 hours of railroad time, and that's beyond me. I know
18 as jurors, government reminds you, using your common sense, I
19 know you have that, and therefore you won't be fooled that
20 playing golf four times a week would somehow suggest and
21 comport with the definition of being able to hold a job in the
22 national economy. Are they kidding me?

23 But what do they do in order to demonstrate that Gus
24 Baran, he's a fraud? All these numbers that he got for
25 disability that he earned as a result of the fine work that he

D7VLLES6

Summation - Mr. Jackson

1 did for that railroad, they bring to you a doctor that they
2 hired, right. And we've heard about his \$70,000. All the tax
3 returns we've seen, be nice to see his.

4 But in any event, the reality is is that you saw a
5 doctor that they called to testify and that doctor, what did
6 they do? He relied on the records the government gave him and
7 relied on the records that the government gave him, which
8 apparently there was apparently one or another doctor in that
9 entire file, didn't look at Gus Baran, didn't examine Gus
10 Baran, didn't do anything himself in order to assess and
11 analyze Gus Baran's position.

12 We all know, because you heard it time and time again
13 from me about the approximately 12 doctors that Mr. Baran had.
14 Now, if I can just ask you, in appealing to common sense, in
15 the event that you wanted to establish to the jury that Gus
16 Baran is not totally and permanently disabled, do you think
17 maybe one of those 12 doctors could have been called before you
18 and said you know what, yes, I know Gus Baran. I've examined
19 Gus Baran. He's been in my office. I've done an x-ray with
20 Gus Baran. I did an MRI with Gus Baran. I prescribed
21 medication to Gus Baran. He's not disabled.

22 But, no, they don't want to show you that because that
23 would conceal something they know and something if you look at
24 his claim file, which is in evidence and you'll have an
25 opportunity to see. If you look at Gus Baran's claim file,

D7VLLES6

Summation - Mr. Jackson

1 you'll determine and it will show you -- the claim file number,
2 I believe it's 103 or 113 -- it will establish clearly what his
3 ailments were and it will establish clearly and plainly for you
4 that he's a disabled person. He's a disabled man.

5 And don't let the fact that you see a video that they
6 show you on a screen of him swinging a golf club in any way
7 take you away from that critical fact that that's a person who
8 absolutely is disabled, who applied for disability, and as a
9 result of those conditions, was awarded a disability.

10 And in the event that that was not the case, I think
11 that certainly in terms of evidence being brought to your
12 attention, evidence that might have been compelling and
13 persuasive, perhaps, perhaps, only perhaps, and not to be
14 repetitive, a person who actually treated him could have come
15 in that jury box and looked at you and said, you know what, I
16 treated him and it was all a scam.

17 What else do we know? We know that of course didn't
18 happen because it couldn't have happened. You could infer if a
19 doctor who did treat him did testify what they might say, and I
20 think it might have been contrary to the \$70,000 doctor that
21 they paid for to come in here and tell you otherwise, looking
22 at limited forms that they decide to show you.

23 And so therefore when you look and examine Gus Baran,
24 look at his application and the multiple ailments he has and
25 the multiple injuries that are alluded to, the multiple

D7VLLES6

Summation - Mr. Jackson

1 treatments he's got. And not only that, but the various forms
2 of medication that he's taken and the various forms of
3 medication that he has to use every single day in order to be a
4 functioning member of society.

5 And what about with this whole golf claim, do you
6 think maybe they have could have in conducting this
7 investigation brought you in information about what if anything
8 he was taking when he was on the golf course? What about
9 investigating that? What about sending an investigator to
10 follow him as he did the various holes or into the men's room
11 or wherever he was to establish what he was taking to aid him
12 in doing that.

13 But this is a tactic because they don't have
14 information in evidence against Ms. Baran that they're going to
15 attack Mr. Baran. And they're going to attack him in the way I
16 described which is inadequate, wholly insufficient. And I
17 would ask when you evaluate his claim file and evaluate the
18 evidence and the testimony, you reject that as out of hand, and
19 you come to the conclusion that that RRB file, when you look
20 through, will direct you to, that you come to the conclusion
21 that is in the documents on his application, which I need not
22 show you because you've seen again and again on that screen
23 what we saw the various medication, we saw the conditions and
24 we saw the reason nature and purpose of his disability.

25 That's what you need to evaluate. That's the Gus

D7VLLES6

Summation - Mr. Jackson

1 Baran who worked on the railroad that you need to see and the
2 disability income that he received is disability income that he
3 was entitled to. And don't ever let the government divert you
4 otherwise to suggest anything other than that.

5 And so, again, after you look at this, now you have to
6 look at the issue of again character. And let's talk about
7 that issue of character. 180 applicants, remember you saw the
8 diagram with 180 people. 180 people. 180 people. And it
9 showed applications of Ms. Baran as it related to 180 different
10 applicants. 180 people standing, walking, whatever it is, OK.
11 And of those 180 people, ladies and gentlemen, they brought
12 here three witnesses to testify.

13 You're in a draft, right, and you get three top picks
14 of people to come in and to tell a jury how much of a corrupt
15 fraud Ms. Baran is, how she didn't do her job. And who do they
16 bring you? They bring you Regina Walsh, they bring you Michael
17 Stavola, and they bring you Robert Dunaj, and let's talk about
18 them.

19 Now, when you look at Ms. Walsh, for example, the
20 government directs your attention and they say, well, you know
21 what, she had nothing to gain. She had nothing to lose. I'm
22 not entirely sure which trial they sat through because it was
23 introduced in my questioning of her and I think the government
24 introduced a document that she signed.

25 And I asked her a question about what it is based on

D7VLLES6

Summation - Mr. Jackson

1 her testimony she's hoping to gain and she said probation.

2 Why? Because she's not sentenced yet. She's sentenced in
3 September. And so therefore if she would come and testify
4 before you -- and just to be clear, this is a document that's
5 in evidence. Bates stamp 351410. That's Ms. Walsh's
6 agreement. And that looks to be her signature. Nothing to
7 gain. Agreed and consented to. Last page. Signature. Regina
8 Walsh, agreed and consented to. This is a six-page agreement
9 with the government. Again, it's in evidence for you to see.

10 And I won't read it all. Based on calculations, she's
11 facing up to 12 months. It is understood that the sentence to
12 be imposed is to be determined by the Court. But, no, she
13 doesn't have anything to gain. She's just testifying because
14 she wanted to right a wrong and correct a mistake. But is that
15 why she's being sentenced and it's delayed until after her
16 testimony at trial because she has nothing to gain? She has
17 everything, everything to gain in this case by giving the
18 testimony that she did.

19 And let's talk about that testimony because I just
20 don't want to allow you to believe that I'm just focusing on
21 this agreement and saying that would be the basis of why she's
22 misrepresenting things to you and lying about Ms. Baran. I
23 think her own application demonstrates the lies she's told.

24 So let's look at that application. Then we don't need
25 to go through all of it. The government focused you on, you

D7VLLES6

Summation - Mr. Jackson

1 know, Regina Walsh and, my goodness, Ms. Baran lied for her.

2 Ms. Baran called her. She said I'm retiring and I want an
3 occupational disability and she's going to get it and they were
4 in cahoots doing it.

5 Could you blow that up, please. Dates of treatment,
6 well, that looks like November 9, 2005. October 10, 2005. You
7 could read, ladies and gentlemen. It will be with you back in
8 the exhibit room -- in the jury room, excuse me.

9 And when you look at that, does that or does not that
10 predate by a year or more, two years, when she went to
11 Ms. Baran for her occupational disability? So did she speak
12 with Ms. Baran in 2005 and were they cavorting in 2005 for
13 something that they sat down in 2007? You didn't hear that.

14 The fact is that it was her idea, Regina Walsh's, to
15 get an occupational disability. It was her lies that were told
16 regarding an occupational disability, and it's she who's
17 accountable for an occupational disability. This is not
18 something that Ms. Baran said, you know what, let's conjure up
19 together. Let's do this. It's written right in the
20 application. So you match that against her incentive to lie to
21 you and you see it right there. And that's not it, but you
22 look at the application itself.

23 All right. And you see these various boxes that are
24 checked. Now, let's look at that. You'll hear a lot about
25 Section 6. And I shouldn't say you'll hear a lot about it.

D7VLLES6

Summation - Mr. Jackson

1 You've certainly heard a lot before this Section 6 already and
2 this is just something that Marie Baran dreamed up. This is
3 something she did.

4 Meanwhile, it says specifically leg pains when sitting
5 for more than 15 minutes. Leg pains when standing for more
6 than five minutes. Did Ms. Baran just unilaterally decide to
7 throw these things in an application for Regina Walsh who was
8 looking to get an occupational disability in 2005 before they
9 even spoke?

10 And on that issue, who was her doctor? Her doctor was
11 Ajemian, a doctor she had consulted and gone to before she even
12 spoke to Ms. Baran. It makes absolutely no sense at all that
13 Ms. Baran should be held accountable for something that Regina
14 Walsh does. But then again, if you're facing prison time and
15 you're 65 years old or thereabouts, as Regina Walsh is, she,
16 according to the government, doesn't have any incentive to lie.
17 She's just here to right a wrong.

18 And now you see this on the application itself and you
19 see there are various boxes to the left that are highlighted.
20 And that's highlighted for a reason because I'm going to make
21 another point now and that's this. Just a couple things.

22 The first thing is in most of the boxes of the
23 application, of course, the hard is checked. Well, ladies and
24 gentlemen, if it were easy, if it were easy, would they be
25 applying for an occupational disability in the first instance?

D7VLLES6

Summation - Mr. Jackson

1 So naturally a hard box of course is going to be something that
2 might be highlighted with an explanation in it.

3 But by the government's own evidence, own evidence,
4 and I'll show you momentarily, Ms. Baran of course went over
5 applications because on Mr. Stavola's application that I'm
6 about to show you, the boxes are different. Did she make that
7 up too? She said, Ms. Walsh, we have to check this box. But
8 with you, Stavola, we have to check the other box. The reason
9 the boxes are checked differently because as we explained to
10 you and she explained to you, in the event they were filled
11 out, when she spoke with the parties, she switched the boxes to
12 otherwise describe the conditions that they were describing to
13 her.

14 Now, as far as Regina Walsh goes, let's give you a
15 further instance of why she's fabricating and then I'll compare
16 those highlighted boxes.

17 Now we have this email. We have this email,
18 Exhibit 108-E and 108-E is when the Railroad Retirement Board
19 called her. And when the Railroad Retirement Board called
20 Regina Walsh, she's saying that Ms. Baran told me to say all
21 these things. I wanted to get a disability. She told me
22 everything.

23 Well, think about something. This is an exhibit that
24 I have access to. This is something that is in her claim file
25 and you'll have in the jury room too. It's Exhibit 108. And

D7VLLES6

Summation - Mr. Jackson

1 you'll look at her claim file and when you look at Regina
2 Walsh's claim file, I'm going to ask you in evaluating that
3 claim file, tell me -- and claim file contains all of her
4 medical information -- if there's anything that that claim
5 file, the entirety of which Ms. Baran doesn't even have access
6 to, that differs from the claim that Regina Walsh is making.

7 But here's the kicker. This document here, she knows
8 I have access to this document. So she has to explain away to
9 you why a document like this says Regina Walsh had this
10 conversation. And the easiest way for her to explain that is
11 to say let's say Ms. Baran told me to say that, but I put it on
12 scrap paper, but guess what, I can't find the scrap paper. I
13 looked for it last night and the night before, but I didn't
14 come to find it.

15 Does that make any sense whatsoever? And the reason
16 it doesn't make sense is because it didn't happen. She's
17 fabricating and she's covering her own tracks to explaining why
18 there's a document that speaks to what she said when she can
19 only say I didn't say it, someone told me to say it, and it was
20 Ms. Baran. Of course. That's explains it.

21 Now, of course, again, as I mentioned, there's 180
22 people to choose from, but they bring in Regina Walsh, who has
23 every incentive to lie to you. Of the 180 applications
24 Ms. Baran filled out, she's a witness.

25 Now, the second witness we have Michael Stavola. Now,

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Summation - Mr. Jackson

1 Michael Stavola, I don't think we have to spend a lot of time
2 with him. We've learned about all the lies he's told. And I
3 believe that in his testimony he said he was facing up to 85
4 years. And we'll be guided by your judgment in terms of what
5 you remember, but there's another witness whose facing 85 years
6 in jail and although he's facing 85 years in jail, he doesn't
7 have an incentive. No, he's facing 85 years to no jail time
8 and, of course, another witness who's being sentenced after
9 this trial. So, but I'm here to tell the truth.

10 And him being here to tell the truth is after he went
11 to the grand jury and need we go into it? Now, I would suggest
12 to you that the one thing in the grand jury that he made
13 crystal clear before he was arrested thereafter and facing all
14 of this jail time is he said in the grand jury about how
15 Ms. Baran went through the application with him chapter and
16 verse. She did everything she needed to, he gave her answers
17 to questions, he did a number of things.

18 Now, later he changes that and he tells all of you,
19 right, no, that didn't happen. She wrote everything. I don't
20 know anything about it. I didn't see the application. Didn't
21 look at it. Didn't want to get anybody in trouble and that's
22 the point.

23 But, you know, it's telling because if you look at
24 these two applications, if you look at Section 6 of these two
25 applications, you can see where, for example, under the

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Summation - Mr. Jackson

1 application of Michael Stavola, Michael Stavola's application,
2 if I could direct you to where it says eating and bathing,
3 eating, bathing, see that? Eating, easy, bathing, hard. And
4 I'll show you a number of other but, well, you could look at it
5 at your leisure.

6 But look at over here. Eating, bathing, Regina
7 Walsh's application, easy. Did Ms. Baran when she was doing
8 these with applicants just say eeny, meeny, miny, moe, for you
9 I'll say easy, for you I'll say hard, or does it speak to the
10 issue of her conferring with the people she was taking the
11 application for and modifying what was in that application
12 based on what they told her?

13 And also with Regina Walsh, we've already established
14 where it says leg pain for more than 15 minutes. Don't need to
15 review that again. But then we look at Mr. Stavola's
16 application and it talks about extended periods causing severe
17 pain, etc., etc. So it indicates that crouching causes pain,
18 reaching, bending. So that's different from Regina Walsh's
19 application. So did she just decide to invent that with
20 Michael Stavola too? Or does it make more sense, as I have
21 suggested and will suggest repeatedly, that it was Mr. Stavola
22 who in describing those conditions to clarify for Ms. Baran who
23 went through the application who told her that? What makes
24 more sense?

25 And I would suggest to you that in evaluating what

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1 makes more sense, it's obvious who makes more sense. And the
2 person who makes more sense testified yesterday and she
3 testified on her own behalf and she told you exactly what
4 occurred and that's what did occur, ladies and gentlemen, I
5 would suggest.

6 And then, of course, we have Robert Dunaj. And again
7 for Mr. Stavola -- we have a proffer agreement for Mr. Dunaj.
8 We've got another agreement for Mr. Stavola. I won't belabor
9 the point. We know what he said about his 85 years. But
10 Mr. Dunaj, of course, him too. We have a proffer agreement and
11 then we have this agreement that he has with the government
12 about giving testimony. But he doesn't have anything to lose.
13 He has nothing to gain. But, of course, he's being sentenced,
14 as we know, again, after, after this trial.

15 So think about that. Having a hammer put over your
16 head, a hammer is put over your head regarding what testimony
17 you give. But you're going to be truthful. Is there anything
18 in that plea agreement that talks about a conviction? Is there
19 anything about that plea agreement that says someone has to be
20 convicted? Does it say to be truthful?

21 Now, now all of a sudden after all these witnesses are
22 caught in various lies, now they're swearing in front the grand
23 juries and everything else, now they're telling you I'm
24 completely truthful today, ladies and gentlemen. I've had a
25 change of heart. I know I lied to the FBI when they came to my

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1 house. I know I lied to the grand jury. I know when I got out
2 of the grand jury I lied again. I lied to everybody. But to
3 you and today, you can take my word on it. I took that oath,
4 I'm being truthful.

5 And Mr. Dunaj, of course -- before we go to Mr. Dunaj,
6 another thing with Michael Stavola, again, seeing Ajemian well
7 before his meeting with Ms. Baran. So she's in this grand
8 conspiracy to get doctors to tell these exactly what they
9 should say in applications and to make up things to get him an
10 application, but they see the doctors before they see her.

11 So how does that fit into the government's theory of
12 her being a crook and a criminal and a fraud and at 65 years
13 old just decided, you know what, it's about time that I engage
14 in a life of crime? Never did before but I just think that I'm
15 going to take this opportunity, or are these witnesses having
16 some other motivation?

17 And the final witness, again, the big three. They had
18 180 people to choose from. These are the three they present to
19 you. Final witness, Mr. Dunaj.

20 Now, Mr. Dunaj testifies. And you'll have his -- we
21 don't have to go through his application in chapter and verse,
22 but you'll notice how the explanations differ from the other
23 two. And with regard to the explanations and them differing
24 from the other two, Mr. Dunaj, of course, he had a change of
25 heart. He decided to withdraw his application, right. He

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1 decided to withdraw it after he saw the New York Times article,
2 after he know he went in and lied to Ms. Baran and after he
3 knew that the gig was up for his lie, now he pulls it back and
4 again entered into an agreement with the government which
5 requires that he come and he testify in front of you.

6 So this is the evidence that they're relying upon for
7 you to draw the quantum leap, the quantum leap that Ms. Baran
8 here is fabricating everything. Ms. Baran here is in cahoots.
9 She's lying with doctors that they went to before they saw her
10 and she's lying in cahoots with them because she's a good
11 Samaritan? Which brings me to the issue of motive.

12 What motivation does Ms. Baran have to fabricate? She
13 gets paid on the application whether or not they get their
14 disability. She gets paid on the application whether or not
15 the disability application is approved, disapproved, modified,
16 and the witnesses had to admit that because there would be
17 nothing that would substantiate that lie if they said they paid
18 them off. The government would say give them your bank records
19 and they wouldn't show anything.

20 So instead what would Ms. Baran's motivation be to
21 help these people? Did they show you -- they ripped apart,
22 they -- the government went. They got computer records from
23 her and they showed you her tax returns, which we'll get into
24 momentarily, and they showed you all this information and
25 investigated her life for years and going and digging in every

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1 hole in her life.

2 Is there an email from the computer that they ripped
3 out of the TCU office with her and any annuitant saying, hey,
4 I'll create that application for you, don't worry. Give me
5 more money for the application. Is there an email to any
6 doctor, Ajemian, Lesniewski, I don't know, a nondoctor, Joe
7 Rutigliano, is there anything that would be suggestive of
8 Ms. Baran in cahoots or engaging in any type of criminal
9 enterprise with anyone?

10 What motivation other than running a legitimate
11 business, which I will also get into, would Ms. Baran have to
12 fabricate? Why? She's getting paid. She's doing her job.
13 She's a wealth of knowledge and information, as you've learned,
14 regarding retirement issues, regarding the distinction between
15 Long Island Railroad and the Railroad Retirement Board,
16 regarding the nature of the pensions.

17 So is she just a good Samaritan that just wants to
18 defraud the government and cheat them because she doesn't like
19 the government that she worked for for 40 years because they
20 mistreated her? It doesn't make sense. Should there not be
21 some other internal motivation for her to fabricate? She's
22 just going to lie for people because she wants their
23 application approved, is that the theory the government is
24 saying that -- I don't know. I'm just not clear on what her
25 motivation.

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Summation - Mr. Jackson

1 Now, the judge will instruct you regarding motivation
2 and how the government need not prove motive, but it certainly
3 goes to what they like to talk about which is her intent, her
4 intent, her intent. What's the intent here? I'm lost as to
5 why Ms. Baran would unilaterally take it upon herself in her
6 own hands and just decide that she just wants to lie for
7 people. Shouldn't she get something in return if she's lying?
8 Shouldn't there be some end game? Shouldn't there be some
9 justification as to why she would want to lie, why she would
10 want to fabricate? There is none.

11 The motivation is by the three people that come in
12 here to tell you what, to tell you that, you know what, it was
13 all her fault. It was all Ms. Baran's fault. I can say that
14 if I'm getting sentenced and, you know what, it gets me out of
15 trouble.

16 So I'm just anxious to hear. And then the government
17 will point to all the money she made, all the money she made,
18 all of this. Look at the tax returns, 2008, 2009, 2010.
19 Ladies and gentlemen, in America we're allowed to make money.

20 We talk about consultant and we talk about this whole
21 issue and the government brought it up in their case. I don't
22 know how many times I heard ridiculous, ludicrous, and this is
23 absurd and the various adjectives I heard. The only absurdity
24 and ludicrousness and ridiculousness and preposterousness that
25 I heard from the government is their theory as it relates to

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Summation - Mr. Jackson

1 why Ms. Baran would ever want to engage in a life of fraud
2 after working honestly all her life. She gets paid to do her
3 job and you saw and heard what that job was.

4 Because she makes money as a consultant and they say,
5 well, the forms are easy. It's easy. Well, their own
6 witnesses said there was some intimidation as to them, there's
7 some complexity. We're talking about blue collar people. I'm
8 not being at all insulting, but these are blue collar people
9 who work on railroad trains. Ms. Baran has some special
10 information and knowledge as to this, as other consultants did,
11 so they relied upon her to get them through the system to learn
12 what this is all about. There's nothing wrong with that.

13 And the notion and insinuation and the inference that
14 the fact she's just working and doing a business which she's
15 reporting is somehow illegal in and of itself? You didn't hear
16 any testimony or evidence regarding that. She's allowed to do
17 that.

18 And, by the way, in the event that Ms. Baran was
19 attempting to hide or conceal, would she have even put a
20 business, consulting business on her tax returns to begin with?
21 When is the last time you saw a drug dealer file taxes of any
22 sort? I mean I just -- it's beyond me the notion that she
23 would create a business and now she's trying to hoodwink
24 everybody, but she's going to report income from the business
25 that's a fraud to begin with? So you're going to alert the

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Summation - Mr. Jackson

1 government that you're a fraud?

2 Let's talk about the further diversion. Now, since
3 the government, again, having no evidence, relying upon three
4 people who have no character, who have no credibility, who have
5 an interest of their own, of all the people they have to choose
6 from, after they finish attacking her husband, now they attack
7 her with her taxes. And somehow because she amended her tax
8 return in 2007 -- and I don't have to show you. You've seen
9 her taxes over and over again. Somehow that she's amended the
10 tax return from 2007 that that makes her a criminal because
11 she's amended and paid her taxes?

12 And if you look at the 2008 tax return, and they show
13 you these charts -- look at all the money she made by doing her
14 consulting, ladies and gentlemen. Shouldn't people be entitled
15 to do the jobs they want, whatever they are? Isn't that our
16 democracy? That's the way it works. And she's reported her
17 income in 2008, 2009, 2010, 2011.

18 So what do they show that to you for? They show that
19 to you so that it would prejudice you against her. So that you
20 would somehow think this modified tax return, she modified her
21 tax return, she must be doing something.

22 Ms. Baran is 65 years old. The two things you heard
23 about her is she had a modified tax return in 2007 and she had
24 a two-day suspension from work in whatever it was, 2005. If
25 everybody could be so lucky and fortunate as to have those two

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Summation - Mr. Jackson

1 things happen to you in a life and that's all the government
2 could present to you after investigating the case tooth and
3 nail and pulling out records and pulling out computers and
4 pulling out everything else.

5 But you know what, ladies and gentlemen, the
6 government says that may not do it. You may not be prejudiced
7 enough against her because of the fact that she's making money
8 with a legitimate business, and you may not be prejudiced
9 against her enough because we're attacking her husband,
10 bringing in no evidence to support our attacks other than the
11 doctor we paid to not evaluate him, so now they want to talk
12 you to about her trips.

13 And they want to talk to you about the trips as if
14 there's something wrong with going to Egypt, as if there's
15 something wrong with going to the Dominican Republic, as if
16 there's something wrong with going to, Mr. Ryan, Ireland.

17 MR. RYAN: Thank you.

18 MR. JACKSON: The fact is that she's taking trips. Is
19 that a crime to take trips based upon money, moneys that she
20 earned?

21 You didn't hear any testimony about here -- now, of
22 course, the government witnesses want to say I met her briefly,
23 except for Dunaj. I'll give him credit that he mentioned he
24 met with Ms. Baran for the hour and a half. And you might kind
25 of think and wonder, what might he have been doing for the hour

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Summation - Mr. Jackson

1 and a half, playing footsie? I mean what were they doing? She
2 was going over the nature of the application.

3 So if she's working for her income, should you be
4 suaded by tax returns and should you be suaded by trips that
5 she took? And you'll have the passport because, of course,
6 that had to be introduced into evidence. And can I see the
7 travel records? And travel records, which I won't get through.
8 You'll have these to thumb through.

9 But maybe, according to the government, we look at her
10 travel records. I've never been to Ireland. I've never been
11 to Egypt. She was allowed to go Egypt so maybe that's
12 something else you can hold against her. But we know that
13 you're smarter than that and that's not something you're going
14 to do.

15 But why is that diversion brought to you? Why is that
16 smoke screen brought to you? Why are we here talking about the
17 trips she took for money that she earned doing her consulting
18 business and for moneys regarding what her husband earned from
19 his years of service and his disability? In order to divert
20 you from the fact that there's not a shred of evidence pointing
21 to any wrongdoing by her, and so they're asking you to base and
22 convict her based upon the words of people who we've already
23 established have no credibility?

24 Now, let me just shift, if I can, back to the
25 application. I addressed question 39 of the application, won't

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Summation - Mr. Jackson

1 address it again. I promise you. Easy, hard, whatever. OK.

2 But now let's look at question 40. And looking at
3 question 40 of the application, question 40, a normal day.
4 Now, the prosecution when they got up showed you the other
5 Exhibit 17 and said to you something that was a
6 misrepresentation, which you'll see for yourself.

7 All of these are the same. All of them are identical.
8 Look at their, look at the Government's Exhibit 17 versus the
9 exhibit that I showed you and I'm showing you now, which is
10 17D, and look at the distinctions between the responses in
11 Section 6, excuse me, question 40. And what you'll do when
12 you're looking at those is it will become clear, plain to you
13 what she did is she used certain prompt.

14 Again, she created language beforehand because it's a
15 repetitious business. It's a matter of efficiency, you could
16 infer, that, look, all these people have disabilities, this is
17 something that needs to be done, so let me create language and
18 then as they talk to me I'll modify the language.

19 So did she make this up too? The general language is
20 the same, right? But the distinctions regarding the times they
21 woke up, the nature of their activities, I mean we can go page,
22 page, page, I won't, but if you look at all the pages, you'll
23 see that the differences that are there with regard to all the
24 applications, right, a number of applications that she took.

25 So why are these changes there? Because she just

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1 decided to fabricate? Because Ms. Baran was doing her job.

2 She had the prompt and based upon that prompt, she incorporated
3 language that was suggestive of what the people who were coming
4 to her to do had.

5 And we further also know that regardless this is
6 pretty much irrelevant and it's irrelevant because this goes to
7 show, what, it goes to show for mental condition, the whole
8 purpose of Section 6, question 40, is to address somebody's
9 mental or emotional state. It doesn't have anything to do with
10 injury.

11 And so I would ask as you go back into that jury room
12 and you're looking and Ms. Baran is just developing these
13 applications, having no motive herself to do it other than
14 being a good Samaritan, because I just don't understand what
15 else the government is saying to you, the fact she made money
16 they're attacking on complex applications? Again, it's not
17 complex to someone who might wear a suit and tie and go to work
18 every day. But by virtue of, you know, what these own
19 witnesses said and I asked the questions to Stavola. The
20 complexity, yeah, it was kind of complex. And that's what he
21 told the grand jury also. Of course, he says a different
22 story. Dunaj, yeah, a little complex.

23 And, in fact, it was Mr. Dunaj who talked about the
24 distinction in the FBI investigation about like tax forms. I'm
25 just sort of -- I just they're intimidating. So people who may

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Summation - Mr. Jackson

1 not be accustomed to that would need somebody's assistance.

2 What's wrong with that? What's wrong with having a business
3 where you're assisting people, developing an application in an
4 area that you're very comfortable with and they're not?

5 And then to misrepresent to you and to misguide you on
6 question 40 so as to otherwise suggest that question 40 was all
7 the same when we could go through this and you have it, it's
8 Exhibit 17D, and you'll see where there's changes. It just, it
9 defies logic. It defies common sense, some of the arguments
10 that the government is making and I would suggest perpetrating
11 before you.

12 THE COURT: Mr. Jackson, this is time to begin
13 summarizing.

14 MR. JACKSON: Yes.

15 And so if you look at this and then you look at the
16 entirety of her business, let's look at the authorization
17 forms. Authorization forms for purposes of her business,
18 right. There's 86 authorizations forms and you'll have that.
19 They parade authorization forms in front of you like she was
20 doing something wrong with having her clients give her the
21 authorization to do her job?

22 And we know she wasn't doing anything wrong because we
23 also have -- and that's Exhibit 18B -- what we also have, we
24 also have 18A. We have Exhibit 507, which are the call logs we
25 have with the RRB. We have Exhibit 507, which are the call

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Summation - Mr. Jackson

1 logs with the RRB. It's obvious if you look and examine those
2 exhibits that everything she says to them is noted on record
3 and on file.

4 So why parade authorization forms in front of you so
5 as to mislead you? We got those from her computers. So what?
6 She's doing her job with having an authorization form in the
7 first instance.

8 Five minutes, Judge.

9 And so if you examine the totality of the evidence
10 that the government has, they're asking you to make a quantum
11 leap to convict someone who runs a legitimate business and who
12 gives up herself and who served the public for years in and
13 years out and who's done what she's trained to do and knows to
14 do and gets no benefit in return from doing?

15 And then they had the nerve, you remember the email
16 they got, go see Dr. Ajemian. Ask for Marie. Tell them to get
17 the earliest possible appointment. They showed you one such
18 form and they want you to I guess make the inference there were
19 loads of them on her computer when they showed you one and they
20 attack all of her records and everything else. They pulled all
21 her records and all her files and they want you to make the
22 leap she was in cahoots with someone.

23 Who have they established Ms. Baran is in cahoots with
24 in any way, shape or form? The doctors, really? The
25 annuitants that she served? Where is this grand conspiracy

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Summation - Mr. Jackson

1 that we're referring to?

2 And if you look at the nature of her business, you've
3 already seen the forms, the intake forms. She explained them
4 just yesterday. She explained the differences with the Long
5 Island Railroad, the Railroad Retirement Board, the plans that
6 she had. Ms. Baran was doing her job and now she's being
7 prosecuted and caught up in some dragnet to otherwise suggest
8 that, you know what, she's doing something wrong?

9 And then they make this inference, the government
10 wants to make this inference between Metro-North and the Long
11 Island Railroad and why do they do that? And they show you
12 these gross disparities. These gross disparities. Look at how
13 many of these, right. And the reason they show that to you is
14 obvious. There must be fraud at the Long Island Railroad.

15 But you heard the witnesses testify that's comparing
16 apples and oranges. You have a different retirement age at
17 Metro-North, 62 as opposed to 50 at the Long Island Railroad.
18 You have one that gets healthcare benefits when they retire;
19 the other one does not. You have one that has a different base
20 pay, Long Island Railroad has more, so they could afford to do
21 it. So by virtue of that you should make the inference that's
22 fraud?

23 Ms. Baran has lived her life as a law-abiding citizen.
24 She has lived her life serving humanity. She has lived her
25 life honorably, as the character witnesses that I began having

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Summation - Mr. Jackson

1 this discussion with you this afternoon talking about and that
2 I will end talking about. In the same way that they would
3 suggest to you and tell you who Ms. Baran was, that's the same
4 way that her life is exemplified before the government has
5 attempted to perpetrate what I would suggest is an injustice
6 upon her by having you, based upon the evidence that they put
7 before you, hold her accountable and find her to be a criminal.

8 Ladies and gentlemen, I'm confident that you get it.
9 I think that what now has to happen is you have to allow the
10 government to get it. And in allowing them to get it, ladies
11 and gentlemen, I'm confident that you'll reach a conclusion
12 that comports with justice, humanity, decency, and common
13 sense, and that conclusion will bring you to the notion that
14 Marie Baran is not guilty of any charge here.

15 She did her job, she did it well, she served. You
16 have done your job, you have done it well, you have served.
17 Send the only message that you possibly can send here with
18 regard to Ms. Baran and with regard to her being the type of
19 human being she is. And in doing that, I'm confident that you
20 will conclude that she's not guilty of any crime.

21 Thank you.

22 THE COURT: Thank you.

23 Mr. Durkin.

24 MR. DURKIN: Are we going to break at some point,
25 Judge?

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Summation - Mr. Jackson

1 THE COURT: No. Unless --

2 MR. DURKIN: OK with me.

3 THE COURT: Let's go ahead.

4 MR. DURKIN: Can I move the podium?

5 THE COURT: Yes.

6 MR. DURKIN: Not the easiest of tasks of following
7 Ms. Friedlander and my Irish colleague, Mr. Ryan, Mr. Jackson,
8 but I will say the same thing that they said which is thank you
9 to you and thank you for giving me the opportunity to work in
10 kind of the Yankee stadium of the federal court. This has been
11 a thrill for me to be here and it's been an educational process
12 for me as well.

13 I want to start where Mr. Ryan mentioned, which I
14 thought was very appropriate. He said the jury box is where
15 the power of the government and the New York Times stops. And
16 I think that's very appropriate for a case like this, and I'm
17 going to tell you why.

18 You're going to be told that in some of the
19 instructions that the judge is going to give you, and you also
20 heard some of this when you were being asked to be qualified as
21 jurors -- and I know how embarrassing and awkward that is
22 sometimes to have to talk that way. And the reason it is is
23 because we people who spend our lives doing this -- you may
24 wonder what kind of crazy people we are for making those
25 choices, but we have to rely on your answers to those questions

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Summation - Mr. Durkin

1 because that's how the system works.

2 And one of the instructions you're going to get is
3 that you have to, you're reminded that you took an oath to
4 render a judgment impartially and fairly and not to be swayed
5 by prejudice, sympathy or fear and to be guided solely by the
6 evidence in this case and the applicable law.

7 And the reason I start with that is it is if there was
8 ever a case where prejudice or fear could take hold of a jury,
9 this is the kind of case. Twice in the opening statement, in
10 the closing argument Ms. Friedlander suggested to you that this
11 was an epic fraud, a definitive fraud of money that was
12 supposed to be a safety net for suffering people. And shortly
13 after that, she said to you that there was evidence of people
14 traveling around the world on the government's dime.

15 And I bring that up to you because that's dangerous
16 stuff in this day and age. There's an ill will blowing in our
17 country these days that could take hold of you if you didn't
18 follow your oath and say, ha, one more time people ripping off
19 entitlements, one more time people ripping off the government.

20 It would be no more appropriate for you to do that
21 than for me to say to you, you can't convict on this evidence
22 because he'll go to prison. That's out of bounds too.

23 The only thing that you can do -- and we have to rely
24 on your oath and I do -- is render something fairly and
25 impartially because some of what you saw here based on the

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Summation - Mr. Durkin

1 evidence I heard is part of that tension that's in the air in
2 our country right now. There's a debate here about whether
3 these men and women were entitled to this occupational
4 disability, and the evidence that I heard is that that was
5 negotiated by a union contract. And I heard evidence that
6 there was considerable differences in the union contracts
7 between Metro-North and the Long Island Railroad.

8 Now, that's a tricky issue because we're talking only
9 about occupational disability, and that's a totally different
10 issue that goes all the way back to the 1930s when railroads
11 were somewhat different than they are today, when we had a
12 Great Depression and when unions took hold and many people say
13 saved this country.

14 Now, once again, we can argue unions, that could send
15 you over the edge too because there's many -- unions aren't too
16 popular these days. Some of it for probably good reason, some
17 of it not.

18 But that's important for you to view this evidence
19 because the question on the table, as I heard the witnesses, is
20 could these people perform every function of their job. That's
21 different than permanent disability, which the government
22 frequently wants to lop in here. But I will point out to you
23 and I will do the same thing Mr. Ryan asked you to do, take
24 these whole files back there.

25 Ms. Friedlander said witness after witness came in

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Summation - Mr. Durkin

1 here and testified against Dr. Lesniewski. Well, I'm sorry, I
2 only heard four. Four patients came in: Gagliano, Supper,
3 Parlante, and Ellensohn. Those four people took the witness
4 stand the first week. And those four, by the way, if you look
5 at the file and if you recall their testimony, each and every
6 one of them was denied permanent disability.

7 You heard evidence that there was, that the Railroad
8 Retirement Board had to send these people on to get other
9 reviews for permanent disability. Every one of the four people
10 who testified against Dr. Lesniewski -- and some of them I
11 don't even think they testified against him. I couldn't quite
12 tell whose side they were on at some point -- every one of them
13 did not qualify for permanent disability. So don't get misled
14 by that.

15 The question is look in those files and does it
16 provide a basis for them, a medical finding, an objective
17 medical finding for them not to be able to perform any function
18 of their job.

19 The most important one I suggest you should look at is
20 Mr. Supper, who surprisingly to me Ms. Friedlander chose to
21 make it her star witness. Mr. Supper is the one, if you
22 recall, was the engineer and he's the one with the bad
23 shoulder. A lot of debate about all the other issues that he
24 had, but there was no question based on my observations of the
25 testimony -- and you decide -- that he had a bad shoulder.

D7VLLES6

Summation - Mr. Durkin

1 Now, Supper, just like every one of the parrots who
2 came in to parrot the government line here, I might add, which
3 was did you get any treatment? Oh, no, I didn't get any
4 treatment. Did you -- were you able to do your job? Oh, sure,
5 I could still do my job.

6 But the question isn't whether they think they could
7 still do their job. The question is did they qualify at the
8 time. And Supper is Exhibit A because do you remember -- I was
9 kind of embarrassed doing it, but do you remember me saying to
10 Supper, excuse me, you're the driver of the train, right? 1500
11 people, big engines, we went through all those engines. I said
12 excuse me, you have a bad shoulder, right? Yeah, I got a bad
13 shoulder.

14 Don't you have to have one arm -- remember I kind of
15 sat here and said, don't you have to sit here and stare ahead
16 and don't you have to grab the throttle at one time and while
17 you're grabbing the throttle still be able to reach up and pull
18 the horn and pull the brake? Yeah. That's, that's what an
19 occupational disability is. That's the question.

20 And the question is what kind of evidence did they
21 present? The first witness they presented, Gagliano, I thought
22 it was ridiculous because the first -- and, by the way, maybe
23 I'm wrong, maybe I'm nuts, but did you notice a little bit of
24 difference between each and every one of these four patients
25 when they were on direct examination versus when they were on

D7VLLES6

Summation - Mr. Durkin

1 cross-examination?

2 Do you remember Mr. Parlante, for example, the guy
3 that got hit by the train, nothing wrong with me, Parlante
4 says. Oh, yeah, really, the last day you're on the job you get
5 hit by the train but you're OK. You can still keep working.
6 Yeah, we can rely on that evidence to convict somebody, can't
7 we?

8 Do you remember I had to ask Parlante after about the
9 fifth time in a row, you don't remember talking to the
10 government? You don't remember saying this? I had to say to
11 him, is there something wrong with your memory? That's
12 evidence that we're going to use to prove beyond a reasonable
13 doubt because now he's saying, oh, now I'm part of a
14 conspiracy. Yeah, I was part of a conspiracy. I was part of a
15 conspiracy with Dr. Lesniewski.

16 Oh, really? Did you tell him you were? Did he tell
17 you you were? Why did you stop going through the charade? Why
18 didn't you just stop the charade then? Why didn't you just get
19 on with it if you're paying that kind of money? Do you
20 remember those questions of those witnesses?

21 But the most ridiculous one was the very first
22 cross-examination I did with Mr. Gagliano. Just so you don't
23 think I'm making this up.

24 Up until the New York Times, you never thought you
25 would engage in criminal activity concerning this, did you?

D7VLLES6

Summation - Mr. Durkin

1 I didn't think so, no.

2 Of course he didn't and neither did any of these four
3 because this is a conspiracy created by the New York Times and
4 adopted by the government because it's easy, it's easier to
5 deal with the allegation of fraud than it is what do we do with
6 this union contract? What do we do with this complex social
7 issue that we're dealing with left over from the thirties?
8 What do we do about the fact these people can easily qualify
9 and yet the Metro-North can't because they have to wait?

10 And this whole thing about the charts and the
11 Metro-North is beyond me. You know, you can really get
12 snookered into that one pretty easily because the whole point
13 of it is if you can't retire until you're 60, you're not going
14 to try to get disability to only get 50 percent of your salary.
15 That's why all these charts with the Metro-North you can throw
16 right out the window. They're smoke screens. This is a chart
17 case. This is a guess, a leap. Make the leap with us and the
18 New York Times that this is some type of premeditated -- wait
19 until you see this indictment -- premeditated fraud scheme.

20 Did one witness say that they engaged in a
21 conspiratorial conversation with Peter Lesniewski? No. Did
22 one person say anything other of these four patients -- and I
23 don't fault them. They're in an impossible situation.

24 You heard Parlante. You heard him say he went to the
25 grand jury without a lawyer, ended up getting charged with

D7VLLES6

Summation - Mr. Durkin

1 perjury or accused of committing perjury because he didn't
2 think they were looking at him. That's what Parlante says.
3 Another one of their star witnesses.

4 I go to the grand jury and I think they're looking at
5 other people and all of a sudden, I asked him, he said I got
6 frightened in the grand jury. That's why he lied. He said he
7 got frightened. I said what did you get frightened by?

8 When I went there, I didn't think they were looking at
9 me.

10 I said, but then all of a sudden spotlights turned on
11 you, you got scared?

12 Yeah.

13 So he says then he lied. I'm not too sure about that.
14 He might well have been telling the truth, but it wasn't the
15 truth on the government's version. But that's neither here nor
16 there.

17 The question is can you convict anybody on that
18 evidence? Gagliano, they want to put the picture of the bike
19 ride up there? He had shoulder problems. So you can't ride a
20 bike? It's the same kind of thing. What does that prove?

21 Look at these files. If you look at, if you just --
22 and I don't want to belabor it because it's late in the day,
23 but if you look at the patient notes that are in each and every
24 one of those files and I'll use -- forgive me. My mouth works
25 faster than my head.

D7VLLES6

Summation - Mr. Durkin

1 This is Gagliano, the guy who -- first witness --
2 didn't think he was committing a crime at the time he was doing
3 it. Surgical intervention. Take a look at the patient notes.
4 You're going to have these all back there. Very first time
5 he's there, Dr. Lesniewski says the patient will need surgical
6 intervention.

7 Now, I think Ms. Friedlander said I'm going to try to
8 distract you or confuse you with this one because I'm going to
9 say the surgery disproves the conspiracy. Well, I'll stand by
10 that argument. Why, if Peter Lesniewski was in a conspiracy
11 with Gagliano, Supper, Parlante, or Ellensohn, would he
12 recommend surgery at all? And how many of them said to you or
13 how many of them said in response to my question, no, I didn't
14 want the surgery.

15 Gagliano of all people didn't want the surgery. One
16 of them, I think it was Parlante, wouldn't even take the
17 anti-inflammatories. Remember the debate I had with Parlante
18 over treatment? Check your notes on that one on my
19 cross-examination of Parlante on treatment. It was absurd. He
20 basically admitted that treatment only amounted to something he
21 decided to do.

22 And I had to beat it out of him essentially to say,
23 oh, so if you go to a doctor and he offers you an
24 anti-inflammatory and you decide against the doctor's advice
25 not to take the inflammatory, then you can say with a straight

D7VLLES6

Summation - Mr. Durkin

1 face that you didn't get any treatment. Just like with the
2 surgery. That's what Parlante said. Again, your memory is
3 more important than mine, but you can check.

4 Here's Gagliano again. You've got to look at these
5 notes. These notes I submit to you create a reasonable doubt
6 unto themselves on this evidence because you will see time and
7 again notes like this that will say, therefore, I would treat
8 this with anti-inflammatory, will not do surgery. Every one of
9 these files had something like this in it and I submit to you
10 unto itself is enough to create a reasonable doubt that Peter
11 Lesniewski engaged in any conspiracy with any of these people.

12 And, by the way, the evidence, you know, is
13 unquestionable that he didn't engage in any conspiracy with
14 Mr. Rutigliano or Ms. Baran. They don't even know him other
15 than they know of him. So you're going to have to search far
16 and wide, I think, to find evidence in these files, the patient
17 files, based on these notes that this was a scam.

18 (Continued on next page)

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D7vnles7

Summation - Mr. Durkin

1 Just like what I said to these people. What do you
2 mean? It was Ellensohn I think. No, it was Supper.

3 I said at one point, why did you go through the
4 motions? Why didn't you just wait?

5 I think it was Gagliano that said, Oh, I didn't want
6 to -- what did he say? Parlante. I was cross-examining
7 Parlante about this. Wait until you hear this if you don't
8 remember it. I remember it. I just didn't remember which one
9 it was.

10 I said to Parlante, I asked him about whether he came
11 to trust Dr. Lesniewski.

12 He said, I have no opinion on that.

13 What?

14 It didn't matter to me.

15 I said, What didn't matter to you?

16 Any of the diagnoses he came up with, as long as I got
17 the disability.

18 "Q. Did you ever tell him that?

19 "A. No.

20 "Q. Why didn't you just tell him that?"

21 A pretty logical question if this is really some type
22 of conspiratorial agreement that they say it is.

23 Why would I?

24 Well, if it didn't matter to you, why didn't you just
25 tell him? Why didn't you just tell him?

D7vnles7

Summation - Mr. Durkin

1 I didn't want to make it matter to me either.

2 I said, Pardon? Like, what are you talking about?

3 He says, I didn't want to make it matter to me either,
4 creating some kind of backlash with it.

5 Then my next question is, Just like you didn't want
6 the surgery because you knew if you got the surgery you might
7 not get the disability, right?

8 Oh, no, not at all, he said.

9 I was already doing something that kept the pain at
10 bay. I didn't want to get the surgery because the pain wasn't
11 enough to qualify in my mind for surgery if I could keep the
12 pain at bay by working out, which is what I call physical
13 therapy.

14 That's your physical therapy?

15 Yes.

16 You want something else that might create a reasonable
17 doubt just on a piece of paper. The government made a big deal
18 this morning -- it seems like it was a week ago -- about
19 Parlante.

20 Do you remember they talked about Parlante coming in
21 in November of '06. He get hit by the train.

22 This is a guy, mind you, you want to talk more
23 certainty. This is Christopher Parlante they want you to rely
24 on to contradict Dr. Lesniewski.

25 And Parlante says, When I got hit by the train, he

D7vnles7

Summation - Mr. Durkin

1 said -- of all the people in the world, when you got hit by a
2 train and you really needed treatment, this is the guy, of
3 course, he didn't go to Lesniewski for treatment. He just went
4 for a paper trial, right?

5 Of all the people in the universe when you were
6 unequivocally, no question asked, really hurt, when you got hit
7 by a train, of all the people in the world who did you go to?

8 Peter Lesniewski.

9 And you let him treat you?

10 Yes.

11 And the treatment worked, because that's when he
12 decided he would take the anti-inflammatory.

13 But the government said with a lot of fanfare this
14 morning, Here's the smoking gun, because Dr. Lesniewski, his
15 narrative was dated the 24th of November. Let me see if I can
16 find it. I had it here a minute ago, but I get carried away
17 with myself.

18 The government told you this morning that they thought
19 this was a smoking gun because on November 24 of 2004
20 Dr. Lesniewski wrote the narrative for Parlante.

21 You will remember that Parlante got hit by the train
22 celebrating Halloween on the last day of October, the first day
23 of November, the night shift, 2004.

24 Then she said, you know why this is false.
25 Apparently -- I'm sorry. I have a different copy. Do you mind

D7vnles7

Summation - Mr. Durkin

1 putting up the one that you had. I think it's 104-D.

2 Go down to the bottom.

3 "Apparently he was sideswiped by a train."

4 I'm sorry. Could you go to the second page.

5 They said here's the smoking gun. "He was placed on
6 steroids and has not been seen since."

7 Then they showed you, I believe it's 104-D or E. It's
8 the chart. Do you have the chart? Can you go to November
9 24 -- November 23.

10 If you go up, could we have the whole page just for a
11 second.

12 What's interesting about this smoking gun is that
13 that's clearly not Dr. Lesniewski's handwriting. That's
14 clearly the nurse's handwriting, because we know from all the
15 other charts that whenever Dr. Lesniewski sees somebody he has
16 the typewritten notes. There is no typewritten note.

17 So I submit to you based on that evidence that it is
18 every bit as likely that this was already dictated and Parlante
19 may have come on the 23rd to pick it up and he wasn't there or
20 there's a typo on the 24th, because there is no evidence
21 whatsoever that Dr. Lesniewski talked to that person, to
22 Parlante, on the 23rd.

23 So the smoking gun goes out the door. Just because
24 the letter is dated the next day doesn't work.

25 That's the best they can come up with on that?

D7vnles7

Summation - Mr. Durkin

1 One final thing about these four patients. Talk about
2 another smoking gun. Here's what the government says is
3 another smoking gun. Gary Supper's note. I submit to you
4 there is a different explanation as the smoking gun.

5 If you were really a coconspirator, what would this be
6 doing in a file that you were going to turn over to the
7 government, if this were really something incriminating?

8 I submit to you that you can draw the opposite
9 inference, which is the fact that they have it proves it is not
10 a smoking gun because only an idiot would leave this in the
11 file.

12 But, more than that, what proves that it is not a
13 smoking gun is that Supper admits and contradicts the whole
14 point of the smoke, which is Supper says, I asked him for four
15 tests, MRI, EMG, NVC, NSC test. Not only does he ask for four
16 tests, he asks for it on his back, knees, and ankle.

17 So that's 12 different tests that they would have you
18 believe my flunky client coconspirator took orders from this
19 coconspirator and just rushed right out and did it.

20 Check the file. You will be happy to know, even as he
21 admitted, that Dr. Lesniewski only performed two of those
22 tests, two MRIs. And talk about blowing the smoking gun right
23 out of the water, you will have the results of those two tests.
24 One actually found a meniscus tear on Mr. Supper's knee. So,
25 lo and behold, ask the government where the other ten tests are

D7vnles7

Summation - Mr. Durkin

1 if this evidence should be interpreted the way they are asking
2 you to interpret it, just like the statement that they say is a
3 confession. It is not a confession any more than I am Derek
4 Jeter.

5 You will have this back there. You conclude on your
6 own whether this is a confession. I think you will agree with
7 me that it is nothing close to a confession. In fact, it
8 supports innocence as much as it supports guilt or
9 consciousness of guilt.

10 Keep in mind the date of this, which is October 29,
11 2008. When you look at this statement, keep in mind the date
12 of the great New York Times exposé, which is September 19,
13 September 20 of 2008.

14 People are running around, all these investigators are
15 running around like chickens with their heads cut off because
16 the one thing politicians know how to respond to is the New
17 York Times. We're going to get to the bottom of this all
18 right. They did. This is the bottom they got to, this case,
19 this evidence.

20 Now, I'm going to do something different than my Irish
21 colleague asked you. I am going to ask for a verdict, but it
22 is a different kind of verdict. You are going to be instructed
23 by the judge about reasonable doubt. The first thing he's
24 going to tell you is that the government always wins when
25 justice is done, regardless of whether the verdict is guilty or

D7vnles7

Summation - Mr. Durkin

1 not guilty.

2 That's true. Both Mr. Ryan and I used to be federal
3 prosecutors, and when we were prosecutors that's what we
4 expected. That's still what I expect.

5 I have spent my career in these rooms. I care about
6 what goes on here. I submit to you the day that we have to
7 worry about the government winning at all costs is the day we
8 all ought to get out of Dodge.

9 Our whole system is built on this. The judge will
10 tell you that reasonable doubt is the cardinal principle of our
11 system of justice; that every person accused of a crime is
12 presumed to be innocent unless and until his guilt is
13 established beyond a reasonable doubt.

14 He will tell you, and so will I, this presumption is
15 not a mere formality. It is what people who give themselves in
16 these courtrooms day in day out expect, no matter what side you
17 are on, whether you are on their side of the aisle or whether
18 you are on our side of the aisle.

19 It doesn't matter whether it's a doctor from Long
20 Island who may not be the best doctor in the world. Maybe he's
21 not the best recordkeeper according to their genius, who by the
22 way also said, I never said anything was made up.

23 Do you remember that testimony?

24 Dr. Barron admitted they didn't even tell him what the
25 charges were. For all he knew I guess this could have been a

D7vnles7

Summation - Mr. Durkin

1 malpractice case. But it's not a malpractice case. It's a
2 criminal case in a federal courthouse in the best federal
3 courthouse in the whole country. The most sophisticated, the
4 best prosecutors in the country work in the Southern District
5 of New York. Everybody who was a federal prosecutor knows
6 that. Everybody would kill to have a spot at that table.

7 But they win when justice is done.

8 The verdict I am going to ask you to give is not one
9 of innocence. It is simply not guilty. The British have a
10 better way of putting it: Not proven.

11 That's what I think happened in this courtroom. It is
12 not proven that Peter Lesniewski engaged in a criminal
13 conspiracy with anyone. It is not proven that Peter Lesniewski
14 intended to defraud the federal government, United Healthcare,
15 or anyone else.

16 If you need any further push in that direction, don't
17 forget the two stipulations that we put in. Relying on your
18 oath and relying on the presumption of innocence, we chose to
19 put on only two stipulations.

20 One was from the office manager, Kelly Michaels, who
21 said to you in a given week, Peter Lesniewski saw 40 to 45
22 patients per week. If you ever want to know why you are always
23 waiting in a doctor's office, take a look at that stipulation.

24 It says they had a template. I never knew this
25 before. They have a template that they schedule six to eight

D7vnles7

Summation - Mr. Durkin

1 people every 15 minutes. I mean they schedule two people every
2 15 minutes.

3 It's always been one of my great thrills whenever I've
4 represented a doctor, and he gets very upset with me when I do
5 it, you never let him come in on time. I let him sit in my
6 waiting room all the time, just for payback. And I tell him
7 that. He takes it in good nature.

8 Now I know why -- I'm sorry. Did I say week? 40 to
9 45 patients per day. Per day, which might give you a bit of an
10 explanation as to why those notes aren't as good as the
11 highbrow professor from Columbia and Mount Sinai and wherever
12 he was from in Midtown Manhattan.

13 That is a little bit of a different practice then when
14 you are out on the Island working, treating backs of railroad
15 workers and anybody else who walks in.

16 But think about that. They put up evidence in these
17 charts, 134 people. You can do the math any way you want. I
18 am not going to play games with you that way, but you could.
19 If I wanted to play a game, I would say divide that by, you
20 know, he gets two people a week from the Long Island Rail Road.

21 But more than that, the other big point of their
22 argument that their evidence they think shows is this United
23 Healthcare money, how critical that was.

24 Several different times Ms. Friedlander said something
25 to the effect, They did it for easy money, or I think she ended

D7vnles7

Summation - Mr. Durkin

1 her argument, if I got it correctly, saying, Use your common
2 sense. They did anything they had to do to make a quick buck.

3 I am going to ask you to use your common sense, too.
4 Take a look at this, you want to use common sense.

5 Bear with me. I'll get it. Just take a look at this.

6 \$62,000 from United Healthcare in 2003 when he had
7 gross receipts of \$753,000.

8 Is that evidence that would cause somebody to do
9 anything that it took to make a quick buck? I don't think so.

10 Take a look at 2004. Out of \$781,000, \$65,000.

11 In 2005, \$50,000.

12 And I might add, you want to think about another
13 reasonable doubt, if this was such a great conspiracy and he
14 was such a big co-conspirator, how come it doesn't go up
15 instead of down. How come he has fewer Long Island Rail Road
16 patients in 2005, 2006, 2007?

17 Is that evidence of a conspiracy, or is it evidence
18 that they, the workers, went somewhere else? They put this
19 fancy chart up there that talks about all the doctors. That
20 cuts both ways, too.

21 How does that work? How does that make it more likely
22 that Lesniewski is a coconspirator? Maybe it makes it less
23 likely.

24 He only saw 134 patients, Ajemian saw 444, and Parisi
25 saw 239. As Mr. Dratel told you, that was something like 79

D7vnles7

Summation - Mr. Durkin

1 percent of the whole total. Two of them did that. So I can
2 argue, if I want to be cute, and say that is evidence of
3 innocence, not guilt.

4 Why didn't it go up if he's the coconspirator? It
5 doesn't fit. 13 percent.

6 You also heard testimony of why. Somebody said about
7 United Healthcare, they had their name there. One guy said, I
8 went to him because he was the closest. That's evidence of a
9 conspiracy, because other people said they were the go-to guys?
10 Really?

11 I am not asking you to give him a medal, and I'm not
12 asking you to give him doctor of the year. What I'm asking you
13 to do is what jurors have been doing in this country for over
14 200 years, and that's saying, I'm sorry, I have a doubt. I
15 have a reasonable doubt. You did not prove the case.

16 As Judge Marrero told us, It's OK, government. You
17 win when justice is done. I'm going to ask you for a verdict
18 of not proven because that is what I believe this evidence
19 shows, not proven.

20 Thank you.

21 THE COURT: Why don't we take a five-minute break just
22 to stretch.

23 (Continued on next page)

D7vnles7

Summation - Mr. Durkin

1 (Jury not present)

2 THE COURT: Mr. Weddle, how long will you be?

3 MR. WEDDLE: I could probably give a better sense if I
4 have a minute to try to organize my thoughts, your Honor.

5 THE COURT: All right.

6 (Jury not present)

7 (Recess)

8 THE COURT: All right. Bring in the jury.

9 Mr. Durkin, when you made reference to this Court as
10 the best in the country, does that include Chicago?

11 MR. DURKIN: I was talking about you, Judge. This is
12 the reputation.

13 MR. RYAN: Needless, to say, Judge the rebuttal is not
14 the second crack at the apple; it is a rebuttal to the defense
15 summations?

16 THE COURT: Correct.

17 (Continued on next page)

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Rebuttal - Mr. Weddle

1 (Jury present)

2 THE COURT: Thank you. Welcome back.

3 Mr. Weddle, I would say 15 to 20 minutes.

4 MR. WEDDLE: Thank you, your Honor.

5 Good afternoon, ladies and gentlemen.

6 JUROR: Good afternoon.

7 MR. WEDDLE: We are coming to the end. This is the
8 government's rebuttal. It is our final word. I am going to
9 try to respond briefly to the defense arguments that they have
10 made. They were extensive, and I am going to try to group them
11 together as much as I can.

12 But over the past two weeks you have heard witness
13 after witness tell the story of a culture of corruption at the
14 Long Island Rail Road, a culture of corruption that involved
15 hundreds of people, millions of dollars of disability claims,
16 the same pattern, the same three doctors, the same
17 facilitators, year after year, generation of Long Island Rail
18 Road employee after generation of Long Island Rail Road
19 employee.

20 Witnesses came in here and testified consistently,
21 participants in the fraud, Long Island Rail Road retirees who
22 told you they could do their job. They were not disabled.
23 What they wanted to do is they wanted to retire early without a
24 cut in their pay.

25 MR. RYAN: I'm sorry, Judge. Objection.

D7vnles7

Rebuttal - Mr. Weddle

1 Not rebuttal.

2 THE COURT: Overruled.

3 MR. WEDDLE: In order to do it, they knew what the
4 pattern was. They went to the same doctors. They started
5 before their predicted retirement date so they could create a
6 paper trail.

7 What is the point of the paper trail? To dupe the
8 RRB, to convince the RRB that they were suffering, that they
9 were disabled, that they were unable to do their job from a
10 slew of diagnoses, when the reality was they had planned this
11 months or years in advance.

12 They were looking for the day that they got their 30th
13 year or right after they turned 50 years old or they wanted to
14 wait until they had their hundred days and they got their
15 vacation pay for next year, or until November or December when
16 they finished paying their payroll taxes for the year for a
17 couple of percentage points in taxes. They were planning a
18 disability to occur in November months or years in advance.

19 This was not what you have heard in some of the
20 testimony from Marie Baran about people working wounded, people
21 in misery and pain. You saw that from the comparison between
22 Long Island Rail Road and Metro-North two commuter railroads.
23 Robert Murray from the MTA testified they are the same size
24 railroad. They have the same equipment. They are in the same
25 city. They are doing the same function.

D7vnles7

Rebuttal - Mr. Weddle

1 There is one major difference. The defense agrees
2 with this difference. Marie Baran testified about it. Marie
3 Baran's other witnesses testified about it. The difference is
4 retirement. It has nothing to do with pain. It has nothing to
5 do with disability.

6 At the Long Island Rail Road, people can retire early,
7 at the age of 50, and get half their pension.

8 You know what. If you want to retire early and retire
9 at age 50, go ahead. That's fine. There is nothing wrong with
10 that.

11 If Joseph Rutigliano wants to retire early and retire
12 on that portion of his pension and live on that and play golf,
13 more power to him. That's great.

14 He didn't do that. Other people at the Long Island
15 Rail Road didn't do that. What they did is they would have
16 kept working, they did keep working until they could cheat and
17 lie and convince the RRB that they were unable to work so that
18 they wouldn't have to take --

19 MR. RYAN: I'm sorry, Judge. I have to object. This
20 is a repeat of the summation previously given.

21 THE COURT: Sustained.

22 MR. WEDDLE: So that they wouldn't have to take a cut
23 in pay and they could retire to the life they wanted to lead
24 with the same income.

25 Now, let me talk and go back through the arguments and

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Rebuttal - Mr. Weddle

1 try to hit all of them that are worth talking about.

2 Let's talk first about Mr. Durkin's arguments. He
3 told you a number of times, probably three or four times, Look
4 at the files, look at these chart notes from Dr. Lesniewski.
5 This chart right here is reasonable doubt he said.

6 Mr. Ryan said the same thing: Look in the file. Look
7 at all these doctor notes and what they say about all the
8 problems that these people had.

9 He's asking you to look at the tools of the fraud.
10 This is how they committed the fraud.

11 Long Island Rail Road people went to Dr. Lesniewski,
12 they went to Joseph Rutigliano, they went to Marie Baran, they
13 paid them roughly a thousand dollars each.

14 Why did they do that? To create false paperwork.

15 What happened to that false paperwork? It ended up in
16 the RRB claim file.

17 That is all they want you to look at. They want you
18 to look at the product of the fraud, what they worked on, what
19 they paid a thousand dollars a pop to get. Fraud. They want
20 you to only look at that, and they want you to take it as true.

21 MR. DURKIN: I am going to object to that as a
22 mischaracterization of my argument.

23 THE COURT: Sustained.

24 MR. WEDDLE: Those documents, the entire purpose of
25 them is to mislead.

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Rebuttal - Mr. Weddle

1 Looking at the witnesses, looking at all of the
2 exhibits in evidence, that is clear. Those documents are
3 false. They are part of a fraud. They are part of a
4 multi-year fraud.

5 And you know what? It worked. That fraud worked.
6 These defendants filled those claim files with lies and the
7 money started flowing. Then the participants in the fraud
8 lived their life however they wanted to live it.

9 It had nothing to do with being unable to work. Let's
10 talk about one part of the application form that the defendants
11 did not talk about. Let's put up, let's try Joseph
12 Rutigliano's application form, questions 11, 12 and 13.

13 Right here. "Enter the date you could no longer work
14 because of your condition."

15 There is nothing complex about that question. It is
16 not hard to understand. You don't have to do what Marie Baran
17 said and ask yourself, well, did you have spicy food sometime.
18 Maybe that makes eating hard for you.

19 You look at this and you are being asked can you no
20 longer work because of your condition. And Joseph Rutigliano
21 said, yes, on October 29, 1999 I could no longer work.

22 He went on. How does your condition prevent you from
23 working?

24 "Severe back, right knee, right shoulder, right wrist
25 and neck pain has made it impossible for me to perform my

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Rebuttal - Mr. Weddle

1 duties as a railroad conductor. I have suffered since 1988 and
2 worked with pain, but my disability" -- and it goes on and on.
3 It is a big sob story. It is a lie.

4 Fine. He was injured in 1988. He worked for a decade
5 with that injury. If he wanted to retire early, retire early.
6 Don't fill an application with lies, send it to the RRB, and
7 try to convince them that you are practically bedridden.

8 Then go out on the golf course and demonstrate for
9 you, ladies and gentlemen of the jury, on videotape that these
10 claims are false.

11 The point of playing golf is not that it is a crime to
12 play golf. The point of playing golf is it shows that these
13 are lies told by Joseph Rutigliano and told on Joseph
14 Rutigliano's behalf by Dr. Lesniewski, because Dr. Lesniewski,
15 remember, gave a narrative in support of Joseph Rutigliano's
16 disability application.

17 These lies and the ones told by Dr. Lesniewski were so
18 extreme that the RRB, the fraud worked. The RRB thought, He is
19 totally and permanently disabled. This is someone who can't do
20 anything.

21 That was false. He was working. He was working.

22 Did he come back to the RRB and say, Wait a minute
23 wait, you got it wrong. I only wanted occupational disability
24 not total and permanent disability. Or, I'm better. I'm
25 better in 2004 since I haven't worked.

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Rebuttal - Mr. Weddle

1 Did he go back to the RRB and say any of those things?

2 Did he say, Wait a minute. I'm actually working. I
3 am making thousands of dollars. I'm making a thousand dollars
4 a pop to fill applications with lies so that other people can
5 engage in the same fraud that I engaged in?

6 Mr. Durkin also argued that the conversations between
7 his client and the witnesses were not explicit enough.

8 He said, Well, gee, if there was really a conspiracy,
9 wouldn't everyone just say to Dr. Lesniewski, Gee, Doc, this is
10 a conspiracy. Let's just cook up to false documents together.

11 First of all, that scenario doesn't make much sense.

12 But, second of all, the witnesses here, it is not
13 typical for conspirators to have that kind of --

14 MR. DURKIN: Objection.

15 MR. WEDDLE: -- explicit conversation.

16 THE COURT: Sustained.

17 MR. WEDDLE: But it in fact happened here.

18 So Mr. Durkin is trying to have it both ways. He says
19 it's not explicit enough, and then we see Gary Supper's note
20 where Gary Supper says, Please document symptoms. My shoulder
21 isn't enough. I want a permanent disability.

22 They argue that that note is not enough. They say
23 that that note is reasonable doubt, because Dr. Lesniewski only
24 managed to get two MRIs back to back -- December 4 and December
25 6, two days apart -- on the very places that Gary Supper asked

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Rebuttal - Mr. Weddle

1 for it.

2 Then on the same day that Gary Supper asked for it,
3 Dr. Lesniewski -- remember, the file that Mr. Durkin wants you
4 to rely on -- Dr. Lesniewski's treatment notes all of a sudden
5 start documenting back pain just as Gary Supper asked for, and
6 knee pain just as Gary Supper asked for.

7 In fact, he was in such a rush to comply with this,
8 and it comes through in the Gary Supper note itself. He starts
9 talking about do we have time to do this, to get the narrative,
10 at the end of the note.

11 Dr. Lesniewski's in such a rush to get this done he
12 does the two back to back MRIs. He writes up a narrative right
13 away. He talks about the MRIs, and what they supposedly show.
14 He couldn't even remember to change the date on the front of
15 the narrative. The MRIs are after the date of narrative. He
16 throws this thing together on request by Gary Supper, it gets
17 sent into the RRB, and it works. The fraud worked again.

18 You don't just have Gary Supper. There's Steven
19 Gagliano, who is going to see a doctor over and over and over
20 again. He's going to see Dr. Lesniewski.

21 Dr. Lesniewski doesn't say: Gee, this is so terrible.
22 It is so sad that you are disabled and you need to stop
23 working. I feel terrible for you.

24 He says, You have enough. Like good news. You have
25 enough. That is an explicit conversation between two

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Rebuttal - Mr. Weddle

1 conspirators engaged in a massive fraud to say I know what we
2 are doing here. We are not trying to make you better. We are
3 trying to create a paper record. And you know what, it is
4 enough. The money is going to come through. That is exactly
5 what he said. That is an explicit, blatant, conspiratorial --

6 MR. DURKIN: I am going to object.

7 MR. WEDDLE: -- conversation that Dr. Lesniewski said.

8 THE COURT: Overruled.

9 MR. WEDDLE: Mr. Durkin, of course, I wish he wouldn't
10 objecting so much, but he is an excellent lawyer, and his
11 cross-examinations were extremely skilled, but they don't
12 change the fact that witness after witness participant in the
13 fraud came in here and told you essentially the same story.

14 Did they all just make that up? They just made up a
15 culture of corruption at the Long Island Rail Road? They made
16 up the fact that they all had heard from their coworkers about
17 how the fraud worked, when you started planning for it, which
18 doctors you should go see?

19 Even Marie Baran testified about who the doctors were.
20 She said her clients were Parisi, Ajemian and Lesniewski
21 people. Everybody knew and you know what --

22 MR. JACKSON: Judge, I am going to object to that.

23 THE COURT: Overruled.

24 MR. WEDDLE: The charts that certain defense counsel
25 don't want you to look at, they corroborate that.

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Rebuttal - Mr. Weddle

1 What does that mean? They confirm exactly what these
2 witnesses were telling you. These witnesses were speaking from
3 their experience at the Long Island Rail Road, where everybody
4 was doing this. But they knew, they knew in their heart. They
5 could do their job. And they were just trying to retire early.
6 That is exactly what they told you from the witness stand.

7 The numbers that you saw on those charts, the 85
8 percent of the people going to see Lesniewski, Parisi and
9 Ajemian, and 126 other doctors is the next category. That
10 shows you that what these witnesses were describing is exactly
11 true.

12 Now, there's been a lot of talk about these witnesses
13 and the agreements that they have.

14 First of all, Mr. Jackson -- I'm sorry, this is going
15 to take a little while -- but he completely misrepresented the
16 three different agreements that he was talking about.

17 There are a number of different kinds of agreements in
18 this case, and you have heard testimony about them. They are
19 all in evidence. You are free to peruse them at your leisure.

20 There are cooperation agreements. Cooperation
21 agreements talk about the fact that defendant will plead guilty
22 and agree to testify truthfully. Look at those agreements.
23 That's what it says. It says testify truthfully.

24 All of those witnesses who had a cooperation agreement
25 they said there's nothing in there about having to get anyone,

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Rebuttal - Mr. Weddle

1 there's nothing in there about having to win some case for the
2 government. They are here on the stand to testify truthfully,
3 and they hope that by testifying truthfully they are going to
4 get a benefit at sentencing.

5 You know what happens if they don't testify
6 truthfully?

7 It's right in the agreement. They are subject to the
8 full penalties. They've already pled guilty. They are subject
9 to further prosecution for perjury. They get no benefit from
10 their testimony.

11 So ask yourself when you are considering these
12 witnesses' testimony, what is more worth it to them? To come
13 in here and, despite the fact that the agreement doesn't
14 require it, they are just going to make up a story to try to
15 get some people.

16 And, by the way, according to these defense lawyers
17 there are making up the fact that they're guilty to. There was
18 no fraud according to the defendants' lawyers. People came in
19 and they plead guilty multiple felonies because they are trying
20 to make up a story and because they think I can plead guilty to
21 a bunch of felonies and lie. I didn't commit them. And then I
22 can make up a story about other people to try to get out from
23 under the sentence that I just invited for myself.

24 MR. DURKIN: Objection. That was not my theory.

25 THE COURT: Overruled.

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Rebuttal - Mr. Weddle

1 MR. WEDDLE: It is absurd.

2 MR. JACKSON: Objection.

3 THE COURT: Overruled.

4 MR. WEDDLE: So take a look at those agreements.

5 There are other agreements in this case.

6 Regina Walsh. Ms. Friedlander talked about this.

7 This is not a cooperation agreement. It is a plea agreement.

8 It says that she is going to plead guilty. It says
9 that if she pleads guilty to the crime that's listed here she
10 will not be further prosecuted.

11 It has a series of agreements about how the sentencing
12 guidelines apply. Take a look at this agreement. There is
13 nothing in this agreement about having to testify, about
14 getting a letter or a 5K motion from the government. This
15 isn't about testifying. Testimony is not mentioned in this
16 agreement.

17 I don't want to read the whole thing to you, but,
18 please, if there's any doubt in your mind about that, take a
19 look at it. It is not a cooperation agreement.

20 Finally, Mr. Jackson was talking about Mr. Dunaj, and
21 he said you should just -- Mr. Dunaj is a big liar too because
22 he has an agreement with the government.

23 Mr. Dunaj's agreement is an agreement to testify, but
24 there is no sentencing. Do you remember when Mr. Jackson said
25 that he hasn't been sentenced and he's going to be sentenced

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Rebuttal - Mr. Weddle

1 after the trial?

2 This is a nonprosecution agreement. It says he will
3 not be prosecuted at all. He hasn't been charged with a crime.
4 He hasn't been arrested.

5 He started down this road, he started down this same
6 road that person after person after person started down. He
7 went to see Dr. Ajemian. He went to see Marie Baran. They
8 cooked up a bunch of false documents. He submitted them to the
9 RRB. And then he had second thoughts, and he cancelled that
10 application. He paid back the money that he got -- I think it
11 was \$4,600 -- and he has not been prosecuted.

12 That's what that agreement says. There is no
13 sentencing for him. There is no sentencing for him. He does
14 have to testify truthfully.

15 Now, you heard from Mr. Durkin that this practice,
16 this Long Island Rail Road fraud practice of Dr. Lesniewski's
17 was a small part of the practice. He has lots of patients.
18 You have to wait in the waiting room and so on and so forth.
19 The dollar amount isn't that high.

20 Here's the problem with that. When Dr. Lesniewski was
21 interviewed by federal agents in 2008, he didn't say anything
22 like that.

23 He didn't say, you guys are here to talk to me about
24 Long Island Rail Road people. I can't pay attention to them.
25 It just a tiny part of my practice.

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Rebuttal - Mr. Weddle

1 MR. DURKIN: Objection. He wasn't asked that and they
2 know that.

3 MR. WEDDLE: He didn't say --

4 MR. DURKIN: Objection.

5 THE COURT: Sustained.

6 MR. WEDDLE: He didn't say, I don't know who you are
7 talking about because it is such a small part of my practice.
8 How would I even know who these people are.

9 MR. DURKIN: Objection.

10 THE COURT: Sustained.

11 MR. WEDDLE: What did he say?

12 MR. DURKIN: Judge --

13 THE COURT: If it is in the record.

14 MR. WEDDLE: Let's take a look at the testimony of
15 Special Agent Del Favero.

16 This was early in the trial.

17 "What did Dr. Lesniewski say about the amount of money
18 he charged to prepare these narratives?

19 "He stated he charged 850 to \$1,000."

20 Just like the witnesses testified. Just like Maher,
21 Parlante -- I'm sorry, not Maher. Just like his patients
22 testified. They testified about paying him for narratives.

23 MR. DURKIN: He said they gave him \$500.

24 THE COURT: Mr. Durkin, please don't interrupt.

25 MR. WEDDLE: "During this interview did Mr. Lesniewski

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Rebuttal - Mr. Weddle

1 also refer to these narratives by another term?

2 "Yes, he did.

3 "What was that?

4 "Summaries.

5 "What did Dr. Lesniewski say was the purpose for doing
6 these narratives or summaries?

7 "He stated that the purpose was for disability
8 benefits.

9 "What did he say about how he prepared summaries for
10 disability benefits purposes?

11 "He stated that he highlighted the summaries to bring
12 things home. He stated that he expounded on the complaints and
13 symptoms of the patients.

14 "And when he was talking about the complaints and
15 symptoms of patients, did he refer to these as positives or
16 negatives?

17 "Positives."

18 Think about that, ladies and gentlemen. That is
19 exactly like what Steven Gagliano told you.

20 People are going to the doctor. If you believe a
21 phony paper trail, they are in crippling pain. It simply can't
22 be cured. They are inevitably going to need surgery after
23 surgery, and they can no longer work.

24 Think about it. If you were a human being and someone
25 came up to you and said, Listen, I have got all these

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Rebuttal - Mr. Weddle

1 diagnoses, I can no longer work, I am in crippling pain, I can
2 sometimes go for a short walk, but I barely leave the house --

3 MR. DURKIN: Judge, I hate interrupt, but --

4 THE COURT: Overruled.

5 MR. DURKIN: -- that is a misstatement of the
6 evidence.

7 THE COURT: Overruled.

8 MR. WEDDLE: Your Honor, this will go a lot faster in
9 I am allowed to argue.

10 THE COURT: You have a few more, Mr. Weddle.

11 MR. WEDDLE: You will say, I'm sorry. That is
12 terrible. That is so sad.

13 Not Dr. Lesniewski. He says to Gagliano, You have
14 enough. When he's interviewed by agents, he is talking about
15 positives, so-called pain. He's accentuating, he is
16 highlighting the positives. That right there is a confession
17 to a conspiracy.

18 MR. DURKIN: Objection.

19 MR. WEDDLE: He knows why people are coming to him and
20 he jumps in and helps.

21 MR. DURKIN: Objection.

22 THE COURT: Sustained.

23 Summarize, Mr. Weddle.

24 MR. WEDDLE: Your Honor, I have two other closing
25 statements that I need to address.

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Rebuttal - Mr. Weddle

1 Oh, Mr. Durkin also made an argument that who would
2 keep this Gary Supper note unless he was innocent.

3 First of all, he's again trying to have it both ways.
4 Either we don't have enough evidence or we have the evidence
5 written in black and white.

6 And he says, Oh, that must mean I'm innocent. There
7 is so much evidence I must be innocent.

8 That is not how the world works. There's so much
9 evidence he must be guilty. That is how these trials go.

10 MR. DURKIN: Objection.

11 THE COURT: Overruled.

12 MR. WEDDLE: That note was not in the RRB claim file.
13 Special Agent Tumulty told you that. He pulled that note out
14 of Lesniewski's own file that was obtained from the practice,
15 not in the RRB claim file.

16 This is something that Lesniewski kept home for
17 himself. He didn't send that in with the rest of the paper
18 trail.

19 Now, let's talk a little bit more about Mr. Jackson.
20 Mr. Jackson talked a lot about --

21 MR. JACKSON: Judge, I am not to trial.

22 MR. WEDDLE: He talked a lot about character.

23 THE COURT: Sustained.

24 MR. WEDDLE: He talked a lot about Ms. Baran's 180
25 clients. And why don't we call more of Mr. Baran's doctors.

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Rebuttal - Mr. Weddle

1 Of course, the defendant has no burden in this case. They
2 don't have to call any witnesses. They don't have to make any
3 arguments.

4 But when they do make an argument, it's fair and
5 proper for you to evaluate it, to ask, Does this hold any
6 water. And if they do call witnesses, it is fair for you to
7 evaluate, What does this witness mean? Should they have called
8 other witnesses?

9 It's totally proper for you to consider that.

10 (Continued on next page)

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Rebuttal - Mr. Weddle

1 MR. WEDDLE: Mr. Jackson is talking about his --

2 MR. DURKIN: Motion, Judge.

3 THE COURT: Overruled.

4 MR. WEDDLE: -- Marie Baran's, he's talking about
5 Marie Baran's own clients, people she testified alternately she
6 couldn't remember or they were close friends of hers. She can
7 call them to the witness stand. Feel free. He's talking about
8 Gus Baran's doctors. He can call them to the witness stand.

9 MR. JACKSON: Judge, I don't represent Gus Baran. The
10 government knows that.

11 THE COURT: Sustained.

12 MR. WEDDLE: I believe the judge will instruct you
13 that the defense has subpoena power. They can subpoena
14 witnesses just like anyone can subpoena witnesses and they can
15 call them to the stand. So.

16 MR. JACKSON: Judge, objection.

17 THE COURT: Sustained.

18 MR. WEDDLE: And I should say a little bit about the
19 fact that Gus Baran, Mr. Jackson made a lot about the fact that
20 in his view we were attacking Marie Baran because she's married
21 to Gus Baran. That's not the case. He's coconspirator. Him
22 playing golf demonstrates, just like it does for Joseph
23 Rutigliano, that his application materials are false. He went
24 to Dr. Lesniewski, just like the same pattern you've seen.
25 They're all conspirators together.

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Rebuttal - Mr. Weddle

1 I'm not trying to tar her for the fact of who she's
2 married to or how much golf he plays, and we're not trying to
3 tar her for traveling. She can travel all she wants.

4 When Gus Baran says it's hard for him to bend or tie
5 his shoes or sit and then you see the video of him bending over
6 fully to the ground with both hands tying, untying his shoes
7 after playing a full round of golf while parked in a
8 handicapped parking space, that shows that that application was
9 a lie and it shows that Dr. Lesniewski lied in support of that
10 application and that the fraud worked. That's what that shows.
11 And that's why we're talking about it.

12 If Gus Baran can't sit, then Gus Baran shouldn't be
13 allowed to sit to fly all around the world. If he wants to fly
14 all around the world, can tell the truth to the RRB and he
15 doesn't have to claim that it's hard for him to sit.

16 Now, he doesn't want to do that because he wants to
17 retire early and get the disability money to fund it, not just
18 live on his regular pension.

19 THE COURT: Two more minutes, Mr. Weddle.

20 MR. WEDDLE: Mr. Jackson also claimed that there's one
21 piece of evidence where Marie Baran was referring someone to a
22 doctor and we saw that on the screen, Navin Patel, where she
23 said call Dr. Ajemian's office, get the first available
24 appointment. There's not just that. There's Marie Baran's own
25 statement to Special Agent Cuocci where she admitted that she

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Rebuttal - Mr. Weddle

1 sometimes referred her clients to doctor.

2 Why is she lying about that now? Because she knows
3 how bad that looks. She's knows that the fact that her clients
4 are going to the same doctors year after year after year and
5 putting in the same cookie cutter applications year after year
6 and paying her a thousand dollars, think about it. She's
7 saying she's a dupe. I'm not sure if you got that. Her
8 argument in closing statement was that she's a victim of this
9 fraud. These Long Island workers came to her and told her all
10 of this stuff is hard for me and they told her I live this sad
11 homebound life which, by the way, is almost identical to all
12 the other question 40 responses that you saw.

13 Take a look at either version. Take a look at
14 Government Exhibit 17D. It's a draft chart. It's longer than
15 the one that we put in, Government Exhibit 17. I think there's
16 68 clippings in that one. They are practically identical. Do
17 you think it makes a difference whether someone gets up at
18 8 a.m. or 6 a.m.? They all are describing the same sad
19 homebound life and, most importantly, they all are saying right
20 up-front, question 11, 12, and 13, are you unable to work.

21 And Marie Baran is pre-filling that form out. She's
22 pre-filling all the check boxes and person after person after
23 person, they go in practically the same. They describe a
24 diminished life, a life of almost no activity. They all claim
25 that people are unable to work when in fact when they're

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Rebuttal - Mr. Weddle

1 meeting with her, she knows they're working. Their daily
2 activities at that time are get up and go to work. Do some
3 overtime to pad your pension.

4 THE COURT: All right, Mr. Weddle. That's it.

5 MR. WEDDLE: Your Honor, could I just have one more
6 minute?

7 THE COURT: Thirty seconds.

8 MR. RYAN: No objection.

9 MR. WEDDLE: Ladies and gentlemen, when you look at
10 all the evidence together, when you look at the Lesniewski
11 confession, combined with the witness --

12 MR. DURKIN: Objection.

13 THE COURT: Sustained.

14 MR. WEDDLE: When you look at the note from Gary
15 Supper, when you look at Baran's cookie cutter applications,
16 when you look at the absurdity of her testimony where she
17 admitted that she saw people, she admitted that the answer is
18 always hard for every one. Remember the acid reflux thing.

19 Where she admitted that the main difference between
20 Metro-North Railroad and Long Island Railroad is that at Long
21 Island Railroad you can retire with a pension, and at
22 Metro-North, if you wanted to stop working at the railroad, you
23 wouldn't have that pension to live on. So when people leave
24 Metro-North, it's because they're really unable to work.
25 They're doing the same job. When they leave Long Island

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Rebuttal - Mr. Weddle

1 Railroad, it's because they're padding their pension.

2 And you've got Joseph Rutigliano's own fraud on his
3 own application, take a look at his claim file. Mr. Ryan was
4 reading to you from a document that shows that the fraud works.

5 MR. JACKSON: Judge, in light of Mr. Weddle's overflow
6 of time, may we have --

7 THE COURT: We're going to put a stop to it.

8 Mr. Weddle, please sit.

9 MR. WEDDLE: Thank you, your Honor.

10 THE COURT: We're going to adjourn for the day. And
11 tomorrow I will be prepared to give you instructions. I will
12 ask that you come at 1 p.m. and the instructions will take
13 about two hours. So by the middle of the afternoon we should
14 be concluding with the instructions and at that point you can
15 begin your deliberations.

16 Until then, you're still not free to discuss the case
17 among yourselves or with anyone on the outside or have any
18 deliberations or read any account. If any of these things
19 occur, you're directed to inform the Court immediately and not
20 discuss it with your fellow jurors.

21 Thank you. Good evening. See you tomorrow at 1 p.m.

22 JUROR: Thank you.

23 (Jury not present)

24 THE COURT: All right. Thank you. Our schedule, we
25 need time in the morning to revisit the draft instructions with

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1 the changes that the Court contemplates. I would suggest that
2 we meet at ten and that will give us enough time to go over
3 changes, give you time if you don't have the opportunity this
4 evening to do so early in the morning. And then we can review
5 any further comments you may have at ten, and thereafter we'll
6 have enough time to put the final draft into paper.

7 Mr. Dratel.

8 MR. DRATEL: Your Honor, if it's possible, if maybe an
9 electronic copy of the draft that has the changes.

10 THE COURT: We'll send you a black line copy.

11 MR. DRATEL: Great.

12 On Mr. Weddle's rebuttal, your Honor, just two, three
13 things. And I think one of them certainly could be addressed
14 in the Court's instruction and I'll just go through the three
15 very quickly.

16 One, he talked about guilty pleas of other persons as
17 establishing, he basically implied and came close to stating
18 outright that that established a fraud. And the Court has
19 addressed that in the instruction. I think it really needs to
20 be reinforced based on that argument.

21 Second thing is he, when he talked about when he said
22 did Dr. Lesniewski say this, did Dr. Lesniewski say that, even
23 though the objections were sustained, there's a lot more to
24 that statement than what was put in evidence. There's a lot of
25 redactions. And I don't know right now -- I'll try to think

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1 about it overnight as to whether something can be done about
2 that, I don't know. But obviously there was more to that
3 statement. So the fact that he didn't say is really not true.
4 He did say more.

5 MR. WEDDLE: He didn't say those things, your Honor.

6 MR. DRATEL: He didn't say this, but he said things,
7 he said some things and I'm trying to go over the statement to
8 see whether -- I don't know if it makes sense to put other
9 parts of the statement in at this point without context.

10 THE COURT: Mr. Weddle was reading from the transcript
11 and I specifically asked him whether he was reading from a
12 transcript, which he was.

13 MR. DRATEL: No, your Honor, before that, he said did
14 Dr. Lesniewski say this, did he said that. He said more than
15 what was introduced in evidence. So that left something --
16 that statement is a redacted statement. And I don't know what
17 the solution is. I'm going to try to think whether there's a
18 solution, your Honor.

19 The third thing is with respect to defense calling
20 witnesses, and I know there's a certain level of fair comment
21 with respect to that, but at the same time these are witnesses
22 who subpoena makes no difference for these witnesses. They're
23 all going to take the Fifth Amendment if we call them. We
24 don't have access to these witnesses. They have immunity
25 power. They can put witnesses on the stand with immunity, with

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1 agreements, with nol pros agreements. We can't. So that's not
2 fair comment, your Honor.

3 THE COURT: All right. The Court's instructions, as
4 you know, stresses and I'll state again that defendants are not
5 required to put on any witnesses.

6 MR. DRATEL: I understand. But the notion of equal
7 availability to everyone is really not the case when it goes
8 into that about Gus Baran, really, there's no possibly that we
9 could call Gus Baran as a witness. It's zero. He could take
10 the Fifth Amendment, as he absolutely would be crazy not to in
11 light of this trial. We do not have access to that witness.
12 They could immunize him if they wanted and put him on.

13 MR. WEDDLE: Your Honor, I was responding specifically
14 to Mr. Jackson's arguments where he said we only saw three of
15 Marie Baran's 180 clients. These are her clients. And he said
16 that we only called -- we didn't call the 12 doctors. We
17 called Dr. Barron instead. He could call those doctors. These
18 people are equally available to both sides. It was a
19 completely fair argument.

20 I wasn't saying that someone should call Gus Baran to
21 the stand. I was responding to that argument. And I think
22 that I said it properly and your Honor's instructions will
23 certainly make clear that witnesses who are equally available
24 to both sides can be called by either side.

25 MR. JACKSON: I don't think he said it properly at

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1 all. I think it was misleading. It was confusing, and it was
2 over the top.

3 THE COURT: To the extent that it was not appropriate
4 or it was not properly stated, the Court's instructions will
5 state it properly.

6 MR. WEDDLE: Your Honor, can I just respond to what
7 Mr. Dratel said about my argument. I think that it's a fair
8 rhetorical point when you're reading from the transcript of the
9 trial of what Dr. Lesniewski said in his admissions to say on
10 these topics he didn't say I don't know who Long Island
11 Railroad people are. He said exactly that he knew who they
12 were, that he prepared summaries for them, that they were
13 coming in for disability and that he helped them get it. So
14 that's fair comment and fair argument. It has nothing to do
15 with the parts of the statement that were not admitted.

16 MR. DURKIN: Judge, could I respond to that because --

17 THE COURT: I'm sorry?

18 MR. DURKIN: Could I respond to what Mr. Weddle just
19 said?

20 THE COURT: Very briefly because we need to break in a
21 moment.

22 MR. DURKIN: What I'd like you to do tonight, we can
23 take it up in the morning, I want you to look at the whole
24 statement.

25 What I'm offended by, what I think was totally wrong

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1 about what he did is they moved in limine to exclude, for
2 example, this language: I put this statement on the narratives
3 to assure that the patient would receive his occupational
4 disability. I thought that an independent doctor would have
5 determined that my statement would fall short of that level for
6 disability. If I -- this statement was inserted based on
7 guidance I received and lack of knowledge of the independent
8 oversight of the process. I was advised that this is the
9 language that was needed for the patient to be considered for
10 disability. If I would have known that there was no oversight,
11 I would not have used this precise language.

12 Now, they moved to exclude this. They knew it was
13 there. For him to get up and say to this jury, well, he didn't
14 say this and he didn't say that, as if he didn't try to
15 exculpate himself, is simply wrong.

16 MR. WEDDLE: Your Honor, I was responding directly to
17 Mr. Durkin's argument which is this is such a small part of his
18 practice. And I said he didn't say it was such a small part of
19 my practice, I don't know anything about it. He knows exactly
20 what it is.

21 THE COURT: I don't want to prolong this because I
22 need to leave in a couple minutes. If there's nothing else,
23 we'll see you at ten in the morning.

24 Let me just give you my reading of two issues that we
25 talked about the instructions so that when you read them,

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1 you'll see how I come out.

2 I am persuaded that we should include the language the
3 government suggests concerning the negligence is not a defense.
4 I recognize the arguments made by defendants on that issue. I
5 think on this record it would not be unusual for people to look
6 at this record and say what were those people at the RRB doing
7 and why should we prosecute these folks here because they were
8 not doing their job. I think it's a fair, it's fair to preempt
9 that kind of thinking by instruction to indicate what is the
10 law, which is in fraud conspiracy, negligence of the victim is
11 not a defense.

12 Second, I am not persuaded that this is an appropriate
13 case for an instruction on conscious avoidance. In this case,
14 as I see the evidence, the defendants, rather than avoiding
15 consciousness of guilt, they were participating, according to
16 the government's evidence and their arguments, they were
17 participating affirmatively. They were not trying to avoid
18 participation or trying to avoid knowledge. So I think that
19 that theory would not work and that instruction will not be
20 given.

21 All right. See you in the morning at 10 o'clock.

22 (Adjourned to August 1, 2013, at 10 o'clock a.m.)

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